SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 105

HARRY KEYISHIAN, ET AL., APPELLANTS,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 10,994

HARRY KEYISHIAN, Buffalo, New York, GEORGE HOCHFIELD, Buffalo, New York, NEWTON GARVER, Buffalo, New York, RALPH N. MAUD, Buffalo, New York, and GEORGE E. STARBUCK, Buffalo, New York, Plaintiffs,

—VS.—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Albany, New York, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, Albany, New York, STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, New York, CLIFFORD C. FURNAS, Buffalo, New York, J. LAWRENCE MURRAY, Albany, New York, ARTHUR LEVITT, Albany, New York, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, Albany, New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, Albany, New York, MARY GOODE KRONE, Albany, New York, and ALEXANDER A. FALK, Albany, New York, Defendants.

COMPLAINT—Filed July 8, 1964

[fol. 2] Plaintiffs, above named, by their attorneys, Lipsitz, Green and Fahringer, for their complaint against the defendants herein, allege:

First: This action arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States, as that amendment exists independently of the First Amendment and as that amendment incorporates the First and Fifth Amendments; further, under Article I, Section 10, Clause 1 and Article VI, Clause 2 of the Constitution

of the United States. This action further arises under Section 1343 of Title 28, and Section 1983 of Title 42 of the United States Code, to enjoin the deprivation of rights secured by the Constitution of the United States. The matter in controversy exceeds the sum of ten thousand dollars, exclusive of interest and costs.

Second: This action is brought on behalf not only of plaintiffs, but on behalf of all other persons similarly situated pursuant to Rule 23(a)(3) of Title 28 of the United States Code. Each of the plaintiffs is a member of a class so numerous as to make it impracticable to bring them all before the Court. The character of the rights sought to be enforced for the various classes is several, but there are common questions of law and fact affecting the several rights and common relief is sought. The plaintiffs here will fairly insure the adequate representation of all members of all classes involved.

Third: This action is brought for declaratory relief pursuant to Section 2201 of Title 28 of the United States Code and to obtain an interlocutory and permanent injunction of certain statutes and regulations of the State of New York pursuant to the provisions of Chapter 155 of Title 28 of the United States Code.

Fourth: Harry Keyishian is a term appointee employed by the State University of New York at Buffalo as an In- [fol. 3] structor in English, under a contract of employment commencing September, 1961, which has been renewed annually thereafter; on February 14, 1964 he was given notice of non-renewal because he refused to sign what is hereinafter known as the Trustees' Certificate, Exhibit "A".

Fifth: George Hochfield is an Associate Professor in the Department of English at the State University of New York at Buffalo, employed for a three-year term commencing September, 1963.

Sixth: Newton Garver is a term appointee employed by the State University of New York at Buffalo as a Lecturer in the Department of Philosophy, under a contract of employment commencing September, 1961, which contract has been renewed annually thereafter.

Seventh: Ralph N. Maud is an Assistant Professor in the Department of English at the State University of New York at Buffalo, employed for a two-year term commencing September, 1963, having originally been employed in September, 1958 for a year term which was renewed annually thereafter.

Eighth: George E. Starbuck was appointed by the State University of New York at Buffalo on the 1st day of October, 1963, under a one-year contract, as a Specialist in Acquisitions, and, in addition, since on or about the 9th day of January, 1964, as a Lecturer in English, which contract has not been honored by defendants since the 18th day of June, 1964.

Ninth: The defendant, Board of Regents of the University of the State of New York (hereinafter called Board of Regents), is a body organized pursuant to the Education Law of the State of New York and is required to administer the University of the State of New York.

Tenth: The defendant, Board of Trustees of the State University of New York (hereinafter called Board of Trustees), is a body organized pursuant to the Education Law of the State of New York and is required to administer the State University of New York.

[fol. 4] Eleventh: The defendant, State University of New York at Buffalo (hereinafter called SUNYAB), is a corporation organized in accordance with the Education Law of the State of New York.

Twelfth: The defendant, Clifford C. Furnas, is President of SUNYAB and is its chief executive officer.

Thirteenth: The defendant, J. Lawrence Murray, is acting head of the State University of New York, and as such is its chief administrative officer, having been appointed, upon information and belief, by the Board of Trustees.

Fourteenth: The defendant, Arthur Levitt, is Comptroller of the State of New York and, upon information and belief, is responsible for all disbursements made relative to plaintiffs herein.

Fifteenth: That the defendant, Department of Civil Service of the State of New York, is a department organized pursuant to the Civil Service Law of the State of New York and is, upon information and belief, the central personnel agency for all departments and agencies of the State Government.

Sixteenth: The defendant, Civil Service Commission, is a body organized pursuant to the Civil Service Law of the State of New York and is charged with the administration of the Civil Service Law.

Seventeenth: The defendant, Mary Goode Krone, is the President of the Civil Service Commission of the State of New York, and head of the defendant, Department of Civil Service of the State of New York.

Eighteenth: The defendant, Alexander A. Falk, is a commissioner of the Civil Service Commission of the State of New York.

Nineteenth: On March 31, 1949, the Governor of the State of New York approved Ch. 360, Laws 1949, being "an act to amend the Education Law in relation to eliminating from the public schools superintendents, teachers and employees who are members of subversive organizations", [fol. 5] and which provisions appear as Section 3022 of the Education Law of the State of New York, popularly known as the "Feinberg Law".

Twentieth: Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law

and Section 3021 of the Education Law of the State of New York as follows: Subdivision (1) of Section 3022, as amended by Ch. 681, Laws 1953, directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the Education Law.

Twenty-first: That Article XVIII, Section 244 of the Rules of the Board of Regents entitled, "Subversive Activities", adopted July 15, 1949, has been adopted by the Board of Regents pursuant to the provisions of Section 3022 of the Education Law, and, upon information and belief, that these rules and regulations have been distributed to the various agencies and subdivisions of the University of the State of New York for their guidance.

Twenty-second: Section 3022 of the Education Law as applied subjects all employees of all public schools and institutions of higher education owned and operated by the State of New York or any political subdivisions thereof to various rules, requirements, procedures, sanctions and penalties.

Twenty-third: That the Court of Appeals of the State of New York has adjudicated and upheld the constitutionality of Ch. 360, Laws 1949, which statute appears as Section 3022 of the Education Law, amended subsequent to such adjudication by Ch. 681, Laws 1953, which amendment inserts in Subdivision (1) of Section 3022 the words, ". . . and the faculty members and all other personnel [fol. 6] and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof . . .".

Twenty-fourth: That the Court of Appeals of the State of New York has adjudicated and upheld the constitution-

ality of actions undertaken pursuant to Section 3022 of the Education Law whereby administrative officials of the public school system may demand information relative to subversive activities from employees of state-owned institutions of learning, and whereby such employees may be discharged upon refusal to respond thereto in the manner required.

Twenty-fifth: Upon information and belief, no claim has been made in respect to any one or all of the plaintiffs herein that said plaintiffs are ineligible to be employed by the University of the State of New York by reason of violation of any of the various provisions of Sections 3021 and 3022 of the Education Law, or Section 105 of the Civil Service Law of the State of New York, or of Article XVIII, Section 244 of the Rules of the Board of Regents.

Twenty-sixth: That upon information and belief, the Board of Trustees established on May 10, 1956 the *Ad Hoc* Committee on Security Regulations in Recruitment of Academic Personnel, which committee adopted, on October 11, 1956, a procedure relative to academic appointments, part of which procedure requires the endorsement of a loyalty certificate by all academic appointees.

Twenty-seventh: That the *Ad Hoc* Committee of the Board of Trustees derived its authority to require the aforesaid loyalty certificate from Section 3022 of the Education Law; that the certificate, in its varying forms (copies of which are attached as Exhibits "A" and "B") constitutes a disclaimer of membership in certain communist organizations and an assertion that Article XVIII, Section 244 of the Rules of the Board of Regents entitled "Sub- [fol. 7] versive Activities" which refers therein to Sections 3021 and 3022 of the Education Law, have been read and constitute conditions precedent to the acceptance of or continuation of employment by all academic personnel in institutions of higher learning owned by the State of New York; the said Exhibits "A" and "B" are hereinafter referred to as the Trustees' Certificate.

Twenty-eighth: That upon information and belief, substantially all academic personnel appointed by or having been assimilated into the University of the State of New York since the institution of the procedures adopted by the aforesaid *Ad Hoc* Committee on Security Regulations, have been required to sign the Trustees' Certificate.

Twenty-ninth: That plaintiffs Keyishian, Hochfield, Garver and Maud have been instructed to sign the Trustees' Certificate and have not done so; that in consequence of such, defendants have announced that the above named plaintiffs will be discharged and that their contracts will no longer be honored.

Thirtieth: That under the statutes of the State of New York and the Rules of the Board of Regents and the Board of Trustees, academic personnel accepted for a term have no right to a formal hearing in respect to non-renewal of their terms for failure to endorse the Trustees' Certificate and that, upon information and belief, no hearing will in fact be accorded term appointees in respect to non-renewal of their terms. Under Section 244 of Article XVIII of the Rules of the Board of Regents, Subdivision (2)(e), the Board of Regents declares:

> In proceedings against persons serving under contract and not under the provisions of the tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal.

Thirty-first: That plaintiff George E. Starbuck has been directed by various officials of SUNYAB to subscribe an answer to the following question:

> [fol. 8] Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?

Thirty-second: Upon information and belief, defendants claim authority to require plaintiff Starbuck to answer the aforesaid question under Section 105 of the Civil Service Law.

Thirty-third: That plaintiff George E. Starbuck can be prosecuted for perjury for falsely answering the aforesaid question.

Thirty-fourth: That plaintiff George E. Starbuck instituted proceedings on the 5th day of February, 1964, in the Federal District Court for the Western District of New York (Civil Action No. 10,741) for a temporary restraining order and preliminary and permanent injunctions against defendants herein to enjoin said defendants from discharging plaintiff in contravention of their contract of employment on the basis that defendants' actions in respect to George E. Starbuck constituted a denial of due process and of equal protection of the laws as required by Amendment 14, Section 1 of the United States Constitution.

Thirty-fifth: That a temporary restraining order was granted but that the motion for preliminary injunction was denied on the 18th day of June, 1964 and that plaintiff George E. Starbuck thereupon was dismissed by defendants without a hearing and is presently unemployed.

Thirty-sixth: That all plaintiffs except Keyishian and Starbuck have either summer employment at SUNYAB during 1964 or research grants during the summer of 1964 from the State University of New York, pursuant to which each will receive moneys in addition to their respective salaries as employees at SUNYAB.

[fol. 9] Thirty-seventh: That Section 105(3) of the Civil Service Law, which is incorporated by reference both into Section 3022 of the Education Law and into the Trustee's Certificate, and upon which the oath required of plaintiff Starbuck is based, requires the dismissal of persons coming within its scope "... for the utterance of any treasonable or seditious word ... or the doing of any treasonable

or seditious act . . . ;" that the phrase "seditious word or act" is therein made to mean " . . . 'criminal anarchy' as defined in the Penal Law".

Thirty-eighth: That "criminal anarchy" and those acts constituting advocacy of criminal anarchy are set forth in Sections 160 and 161 of the Penal Law.

Thirty-ninth: Subdivision (3) of Section 105 of the Civil Service Law was added by the New York State Legislature on the 15th day of April, 1958. The Federal Courts have not adjudicated the constitutionality of either said Subdivision (3) of Section 105 of the Civil Service Law or Section 3021 of the Education Law.

Fortieth: That a certificate which plaintiff Maud and others similarly situated have been required to sign (a copy of which is attached as Exhibit "B") differs from the original Trustees' Certificate as drawn up by the aforesaid *Ad Hoc* Committee of the Board of Trustees (a copy of which is attached as Exhibit "A"); that, further, plaintiffs have no knowledge of the individual or individuals who executed such modification nor do plaintiffs have knowledge of the authority under which such modifications were made.

Forty-first: The statutes of the State of New York and the Rules of the Board of Regents, pursuant to which the certificates and oaths referred to in this complaint are claimed to be required, abridge plaintiffs' rights, privileges [fol. 10] and immunities as secured and guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 10, Clause 1, and Article VI, Clause 2 of said Constitution, and said statutes are unconstitutional and void both on their face and as they have been construed and applied to the plaintiffs, and to all other similarly situated.

Forty-second: The failure to accord a hearing to persons refusing to sign such certificates and oaths upon denial of initial appointment or renewal of appointments,

and the failure to accord a hearing to persons under dismissal wherein such persons can explain and have considered their grievances and objections relative to such refusal to sign constitutes a denial of procedural due process. In effect, a refusal to endorse produces inferences of disloyalty and guilt and, moreover, a conclusion of unfitness for employment, which conclusion is arbitrary and discriminatory. Such automatic and summary procedures are unreasonable and lacking in the degree of fairness required by due process since persons refusing to sign are afforded no opportunity to have conscientious objections for their refusal considered, which objections may be based on a *bona fide* belief that the certificate or oath unlawfully proscribes constitutionally protected speech, or upon religious scruples, or upon an uncertainty of what conduct is proscribed due to the vagueness, prolixity and profusion of the certificates and oaths and, more particularly, of the statutes and rules referred to therein and upon which the certificates and oaths are based.

Forty-third: Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law are invalid on their face due to language which is unduly vague, uncertain and broad. Specifically, plaintiffs aver that the requirement that they refrain from "..., the utterance of any treasonable or seditious word ...," or from "... the doing of any treasonable or seditious act ..." is a proscription so uncertain of objective measurement or ascertainment as to fall far short of the requirements of due [fol. 11] process. Plaintiffs aver further that the words "criminal anarchy" as they stand alone and as defined in Sections 160 and 161 of the Penal Law and as construed are unconstitutionally vague. Further, the statutes eliminate from academic employment any person who "... advises or teaches the doctrine that the government of the United States ... or of any political subdivision thereof should be overthrown or overturned by ... any unlawful means; or prints, publishes, edits, issues or sells any ... written or printed matter in any form containing or ... ad-

vising . . . the doctrine that the government of the United States or of . . . any political subdivision thereof should be overthrown by . . . any unlawful means, and who . . . embraces the propriety of adopting the doctrine contained therein; or . . . becomes a member of any . . . group of persons which teaches or advocates that the government of the United States or of . . . any political subdivision thereof shall be overthrown by . . . any unlawful means." Plaintiffs aver that the statutory language quoted in the preceding sentence enjoins conduct in terms so patently vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and which language consequently is violative of plaintiffs' rights of due process. Plaintiffs allege further, regardless of the vagueness of the language itself, that the prolixity and profusion of the language and the manifold references in the statutes, rules and certificates herein complained of to interrelated provisions, and the uncertainty as to the identity, effect, or pertinence of certain of said provisions results in a vague and uncertain understanding of what behavior is proscribed and therefore, of itself, constitutes a denial of due process.

Forty-fourth: The statutes herein complained of proscribe and infringe rights of speech, association and religion which are protected by the First and Fourteenth Amendments to the United States Constitution. Plaintiff Keyishian and all others similarly situated are prohibited from engaging in constitutionally protected speech and association and might further incur substantial risk of [fol. 12] unfair prosecution for deviations from a vague and unconstitutionally broad standard. Moreover, all plaintiffs herein are enjoined from conduct clearly protected by the First and Fourteenth Amendments and are especially deterred from engaging in such lawful conduct by the continual investigative and inquisitorial procedures required by the Rules of the Board of Regents. The requirement of said rules that one's superiors report on observed deviations from standards so vague and overly broad as those

presently complained of is especially repugnant to the First Amendment inasmuch as it operates inevitably to deter free speech and to discourage controversial and socially desirable discussion and association. Further, such proscription is not justified by a subordinating regulatory interest which is compelling or by a clear and present danger. The statutes, rules, procedures, certificates, and oaths herein complained of infringe plaintiffs' constitutionally protected rights in the absence of any substantial danger from which the State must necessarily protect itself by resort to such measures.

Forty-fifth: The statutes herein complained of may automatically and permanently proscribe one from serving the government of the State of New York in his chosen profession. Because the statute thus penalizes without the intervening safeguards of a judicial trial it is an unconstitutional bill of attainder.

Forty-sixth: The statutes, rules, certificates and questions herein complained of violate the Fourteenth and Fifth Amendments to the Constitution of the United States inasmuch as plaintiffs and others similarly situated are required to divulge information relative to present and past activities and associations and are thereby made subject to possible prosecution.

Forty-seventh: The statutes and rules, certificates and questionnaires herein complained of provide for inquiries into plaintiffs' indefinite past associations, certain of which associations are made prima facie evidence of disqualification for appointment to or retention in any office or position in the State University of New York. Such inferences work automatically, arbitrarily and without jus-
[fol. 13] tification and, therefore, contravene the due process clause of the Fourteenth Amendment.

Forty-eighth: The statutes and rules, certificates and questionnaires herein complained of shift the burdens of persuasion and proof to plaintiffs, under threats of dis-

missal or prosecution for perjury or both, and, as such, contravene the due process clause of the Fourteenth Amendment.

Forty-ninth: The statutes and rules, certificates and questionnaires herein complained of are invalid insofar as they deal with matters pre-empted by existing Federal Legislation.

Fiftieth: The statutes and rules, certificates and questionnaires herein complained of disqualify plaintiffs and others from holding positions in the State University of New York upon criteria which bear no reasonable relationship to qualifications of fitness to hold such positions, and, as such, transgress the bounds of due process of the Fourteenth Amendment.

Fifty-first: Defendants have announced that plaintiffs and others similarly situated will be dismissed imminently if they do not sign the Trustees' Certificate. Moreover, defendants have informed plaintiffs Keyishian, Hochfield, Garver and Maud that dismissal proceedings are presently in effect as to said plaintiffs.

Fifty-second: Plaintiff Starbuck has been dismissed without a hearing on the basis of having declined to answer and swear to the question required of him.

Fifty-third: Plaintiffs Keyishian, Hochfield, Garver and Maud have no knowledge of whether a hearing will be accorded them in respect to their dismissal. Defendants accord no right of hearing to plaintiffs herein in respect to non-renewal of their appointments. Moreover, if a hearing should be accorded in respect either to dismissal or to non-renewal of appointments, the inquiry would be [fol. 14] limited to whether plaintiffs had in fact signed the Trustees' Certificate since, upon information and belief, the charge asserted by defendants will be that of insubordination.

Fifty-fourth: Unless the defendants are restrained from enforcing the provisions of the statutes challenged, and

from demanding the signing of the aforesaid certificates and questions, the plaintiffs and others similarly situated will suffer irreparable injury not compensable in monetary damages.

Fifty-fifth: Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray for the following relief:

1) That a special district court of three judges be instructed to hear and determine this action pursuant to Section 2281 of Title 28 of the United States Code.

2) That pending the hearing and determination by the full court of an application for an interlocutory injunction, that a temporary restraining order be granted, restraining enforcement of the statutes and rules herein complained of and all procedures and proceedings presently pending or to be commenced thereunder or relative thereto and, further, that defendants be ordered to reinstate plaintiffs and all others who have been dismissed or suspended from the State University of New York at Buffalo where such dismissals have been predicated upon a charge of non-compliance with, faulty or alleged untruthful compliance with, or violation of any of the statutes, rules, procedures, certificates or questions herein complained of because of the fact, among other reasons as alleged herein, that irreparable loss and damage will result to plaintiffs unless such temporary restraining order be granted.

3) That the defendants be perpetually enjoined from enforcing the statutes and rules involved and from requiring any certificates, oaths or questions pursuant to the provi-
[fol. 15] sions of the statutes and rules herein complained of, and, further, that defendants be ordered to reinstate plaintiffs and all others who have been dismissed or suspended from the State University of New York at Buffalo where such dismissals have been predicated upon a charge of non-compliance with, faulty or alleged untruthful compliance with, or violation of any of the statutes, rules, procedures, certificates or questions herein complained of; and

that pending the final determination of this action, an interlocutory injunction issue to the same effect.

4) That they be compensated for such damages as have, or will have been incurred by them by reason of the deprivation of their rights and privileges which deprivation is the result of the application or enforcement of any of the statutes or rules herein complained of.

5) That Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law of the State of New York, Section 244, Article XVIII of the Rules of the Board of Regents of the State of New York, and all certificates, oaths or questionnaires required under the authority of said statutes and rules be declared to be void, unconstitutional and of no effect, on the grounds alleged in this complaint.

6) For costs and such further relief as to this Court may seem just and proper.

Dated: Buffalo, New York, July 7, 1964.

Lipsitz, Green and Fahringer, By: Richard Lipsitz, Attorneys for Plaintiffs, Office & Post Office Address, 120 Delaware Avenue, Buffalo, New York 14202.

[fol. 16]

EXHIBIT "A" TO COMPLAINT

STATE UNIVERSITY OF NEW YORK AT BUFFALO

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent

overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

****

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

....

Date Signature

[fol. 17]

EXHIBIT "B" TO COMPLAINT

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents

Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum, are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature

[fol. 17b] [File endorsement omitted]

[fol. 18]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 10,994

[Title omitted]

STIPULATION OF FACT—Filed August 2, 1965

[fol. 19] The following stipulation of fact is entered into by and between Lipsitz, Green and Fahringer (Richard Lipsitz, Esq., of counsel), attorneys for plaintiffs, and John C. Crary, Jr., Esq., attorney for defendants Board of Trustees of the State University of New York, State University of New York at Buffalo, Clifford C. Furnas and J. Lawrence Murray:

1. This stipulation, together with the exhibits attached thereto and the pleadings herein, shall constitute the record of the trial held before the Three-Judge Court appointed herein pursuant to a decision and order dated

May 3, 1965 of the Second Circuit, Court of Appeals, requiring the convening of those judges in accord with the provisions of Title 28, U.S. Code, Section 2284. This stipulation of fact is entered into for the purposes of this action and the parties reserve their respective rights to object to the relevance or materiality of any of such facts to the issue arising herein and to make such contention as they may be advised as to the legal conclusions to be drawn therefrom or the right to relief arising thereon.

2. The title of the action is amended to add as an additional party defendant, Samuel B. Gould, Albany, New York, who is represented in this action by John C. Crary, Jr., Esq.

3. The State University of New York, a corporate body established by the New York State Education Law, employs approximately 17,000 persons (of whom 15,000 are full-time), of which 9,500 are in the unclassified service of the Civil Service (of whom 8,000 are full-time) and are subject to the procedures of the State University of New York for the administration of Section 3022 of the New York State Education Law. Approximately 1,000 full-time and 800 part-time persons are employed by the State University of New York at Buffalo in the unclassified service. Of the persons employed by the State University of New York in the unclassified service at the time of the commencement of this action, the plaintiffs, other than Starbuck, are the only persons who had refused to sign either Ex-[fol. 20] hibit "3" or Exhibit "9" in connection with the continuation of their employment by the State University of New York. Many other persons in the same class as the aforementioned four plaintiffs had objected to the requirement to sign either of said exhibits but at the time this action was commenced, they had done so. At a meeting of between 300 and 400 members of the American Association of University Professors at the State University of New York at Buffalo Chapter certain resolutions, attached hereto and marked Exhibit "1", were adopted.

Plaintiff Starbuck was employed in the classified Civil Service.

4. Plaintiff Keyishian was employed as an Instructor in English by the University of Buffalo commencing September 1961, at a time when the University of Buffalo was not a part of the State University of New York. His appointment was annually renewed through the academic year ending August 1961. On February 14, 1964 he was sent a notice of non-renewal, attached hereto as Exhibit "2". The notice of non-renewal would not have been sent to him, but for his failure as of that time to sign the certificate attached hereto and marked Exhibit "3". Plaintiff Keyishian, during the last year of his employment from September 1963 to August 1964, received a salary of $6236.00.

The University of Buffalo merged with the State University of New York as of September 1, 1962.

The notice of non-renewal referred to is provided for in the policies of defendant Board of Trustees of the State University of New York, a copy of which is attached hereto and marked Exhibit "4".

5. Plaintiff George Hochfield is an Associate Professor in the Department of English of defendant State University of New York at Buffalo, employed for a three-year term commencing September 1963. His present salary is $9922.00 per year.

[fol. 21] 6. Plaintiff Newton Garver was employed by defendant State University of New York at Buffalo as a Lecturer in the Department of Philosophy for a term of one year, commencing September 1961, which has been renewed annually thereafter. He is presently employed in the same capacity. His annual salary is $8355.

7. Plaintiff Ralph N. Maud was an Assistant Professor in English at defendant State University of New York at Buffalo, employed for a two-year term commencing September 1963, having originally been employed in September 1958 for a year term which was renewed annually there-

after. On February 11, 1965, he accepted appointment as Associate Professor with continuing status effective June 1, 1965 under the limitations set forth in a letter dated January 28, 1965 from defendant Samuel B. Gould, attached hereto and marked Exhibit "5", in accordance with a letter dated November 5, 1964 from defendant Gould to defendant Furnas, attached hereto and marked Exhibit "5A". He has resigned such employment as of the end of the current semester, and as of September 1965 will no longer be employed by the defendant State University of New York at Buffalo.

8. The facts pertaining to the employment of plaintiff George E. Starbuck are contained in the transcript of testimony dated March 30 and 31, 1964, together with the exhibits contained therein, from certain proceedings in the case of *George E. Starbuck, Plaintiff*, vs. *Board of Regents of the State University of New York, et al., Defendants*, Civil Action No. 10,741, United States District Court for the Western District of New York. The said transcript together with the exhibits are attached hereto and marked Exhibit "6".

9. The defendant, Board of Regents of the University of the State of New York, is a body organized pursuant to the New York State Education Law and is required to administer the University of the State of New York.

[fol. 22] 10. The defendant, Board of Trustees of the State University of New York, is a body organized pursuant to the New York State Education Law and is required to administer the State University of New York, a corporation established by the New York State Education Law.

11. The defendant, State University of New York at Buffalo, is an institution owned and operated by the State University of New York. Prior to September 1, 1962, it was the University of Buffalo, a private education corporation.

12. The defendant, Clifford C. Furnas, is president of defendant State University of New York at Buffalo and is its chief executive officer.

13. At the time of the commencement of this action, defendant J. Lawrence Murray, was acting head of the State University of New York and as such was its chief administrative officer, having been appointed by the defendant Board of Trustees of the State University of New York. Such appointment was during a vacancy in the office of president of the State University of New York, a position which was filled by the defendant Samuel R. Gould as of September 1, 1964.

14. The defendant, Arthur Levitt, is Comptroller of the State of New York and is responsible for all disbursements made relative to plaintiffs herein.

15. Defendant, Department of Civil Service of the State of New York, is a department organized pursuant to the New York State Civil Service Law and is the central personnel agency for all departments and agencies of the New York State Government.

16. The defendant, Civil Service Commission of the State of New York, is a body organized pursuant to the New York State Civil Service Law and is charged with the administration of said law.

17. Defendant, Mary Goode Krone, is the president of defendant Civil Service Commission of the State of New York and also head of defendant Department of Civil Service of the State of New York.

[fol. 23] 18. The defendant, Alexander A. Falk, is a commissioner of defendant Civil Service Commission of the State of New York.

19. On March 31, 1949, the Governor of the State of New York approved Chapter 360, Laws 1949, being "an act to amend the Education Law in relation to eliminating from the public schools superintendents, teachers and employees who are members of subversive organizations", and which provisions appear as Section 3022 of the New York State Education Law, popularly known as the "Feinberg Law".

20. Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: Subdivision (1) of Section 3022, as amended by Chapter 681, Laws 1953, directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law. For precise provisions of these statutes, reference is made to the texts thereof.

21. Article XVIII, Section 244, of the Rules of the Board of Regents of the University of the State of New York, entitled, "Subversive Activities", has been adopted by the Board of Regents pursuant to the provisions of Section 3022 of the New York State Education Law. Attached hereto and marked Exhibit "7" is a booklet containing those rules and other materials. Said booklet was presented to plaintiffs, except plaintiff Starbuck, in connection with the certificates which have been required to be signed by them.

These rules have been made available to the Board of Trustees of the State University of New York and have been utilized by the Board of Trustees of the State University of New York in its procedures for compliance with the Feinberg Law.

[fol. 24] 22. Pursuant to Section 3022 of the Education Law, all employees of all public schools and institutions of higher education owned and operated by the State of New York or any political subdivisions thereof are subject to various rules, requirements, procedures, presumptions and disqualifications.

23. No claim has been made in respect to any one or all of the plaintiffs herein that said plaintiffs are ineligible to be employed by the University of the State of New York

by reason of violation of any of the various provisions of Sections 3021 and 3022 of the Education Law, or Section 105 of the Civil Service Law of the State of New York, or of Article XVIII, Section 244 of the Rules of the Board of Regents.

24. The Board of Trustees of the State University of New York established on May 10, 1956 the Ad Hoc Committee on Security Regulations in Recruitment of Academic Personnel, which committee recommended and the Board of Trustees of the State University of New York adopted on October 11, 1956, a procedure relative to academic appointments, part of which procedure requires the endorsement of a certificate referred to hereinabove by all academic appointees. Attached hereto and marked Exhibit "8" is a copy of that procedure which also contains a form of certificate hereinabove referred to.

25. The adoption of the foregoing procedure was for the purpose of complying with the Feinberg Law. That on October 11, 1956 Resolution numbered 56-98 was adopted by the Board of Trustees of the State University of New York which states in the following language:

> "Resolved that effective October 11, 1956 all new academic appointments to any unit of the State University of New York shall be made in accordance with the Procedure on New Academic Appointments incorporated into these minutes as Attachment B. (56-98)"

That Exhibit "8", which is the foregoing exhibit, is the procedure referred to in that Resolution.

[fol. 25] 26. Following the adoption of the aforementioned Resolution, all academic personnel appointed by or having been assimilated into the State University of New York, have been required to sign that certificate or in the other form, attached hereto and marked Exhibit "9".

That on or about May 29, 1964, Exhibit "9" was made available to academic employees for the first time. That

the circumstances leading to the availability of Exhibit "9" are explained in a letter dated May 29, 1964 to Peter Nicholls from defendant J. Lawrence Murray, a copy of which is attached hereto as Exhibit "10" with enclosure, which is not the same form as Exhibit "3".

That the enclosure was not acted upon by the Board of Trustees of the State University of New York.

27. Plaintiffs Keyishian, Hochfield, Garver, and Maud have been instructed to sign Exhibit "3" and have not done so. In consequence of such refusal, said four plaintiffs has each been notified by identical letters dated March 20, 1964, a copy of one of which is attached hereto and marked Exhibit "11", and by respective letters dated May 28th and 29th, a copy of each of which is attached hereto and marked Exhibits "12", "13", "14" and "15".

28. Attached hereto and marked Exhibits "16" and "17" are correspondence between plaintiff Maud and defendant Murray, dated June 2, 1964 and June 5, 1964. That plaintiff Maud has not submitted either form of certificate.

29. Under the statutes of the State of New York and the rules of the Board of Regents of the University of the State of New York and the policies of the Board of Trustees of the State University of New York, academic personnel accepted for a term have no right to a formal hearing in respect to non-renewal of their terms. No academic employee will be removed during his fixed term of employment except according to the "procedures provided in Exhibit '7'".

[fol. 26] 30. Plaintiff George E. Starbuck has been directed by various officials of the State University of New York at Buffalo to answer in writing the following question:

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or any political subdivision thereof

should be overthrown or overturned by force, violence or any unlawful means?"

That the question above set forth has been adopted pursuant to the requirements of defendant, Department of Civil Service of the State of New York.

Defendants claim authority to require plaintiff Starbuck to answer the aforesaid question under Section 105 of the New York State Civil Service Law.

31. Plaintiff George E. Starbuck can be prosecuted for perjury for falsely answering the aforesaid question.

32. Plaintiff George E. Starbuck instituted proceedings on the 5th day of February, 1964, in the Federal District Court for the Western District of New York (Civil Action No. 10,741) for a temporary restraining order and preliminary and permanent injunctions against defendants herein to enjoin said defendants from discharging plaintiff in contravention of his claim that his alleged contract of employment on the basis that defendants' actions in respect to George E. Starbuck constituted a denial of due process and of equal protection of the laws as required by Amendment 14, Section 1 of the United States Constitution.

33. A temporary restraining order was granted but a motion for preliminary injunction was denied on the 18th day of June, 1964 and that thereupon the employment of plaintiff Starbuck was discontinued without any further proceedings. Such discontinuance was directed by the defendant Civil Service Commission of the State of New York because of the expiration of the certificate by that defendant of his eligibility for employment.

[fol. 27] 34. Until defendant Gould's direction in his letter of November 4, 1964 (Exhibit 5A), promotions or salary adjustments recommended by the State University of New York at Buffalo would not be made or recommended by the administrative officers of the State University of New York in the case of employees who had failed to sign

either the certificate marked Exhibit "3" or the certificate marked Exhibit "9" attached hereto. For this reason, a discretionary salary adjustment of $326.00 annually was not given to plaintiff Hochfield effective September 3, 1964. Such adjustment was later made effective December 26, 1964. By reason of the withholding of the increase between those two periods, he did not receive a total of $125.00.

A course of instruction to be taught by plaintiff Garver in the night school at the State University of New York at Buffalo for the first semester of 1964 commencing in September 1964, was cancelled because of his failure to sign either of the certificates. He would have received $480.00 to conduct those classes.

Plaintiff Maud was not recommended for promotion to Associate Professor, III, effective September 3, 1964, because of his failure to sign either of the aforesaid certificates. However, he was promoted to this position effective January 1965. By reason of his not having been promoted between those two dates, he did not receive a total amount of $359.68 between those dates. Plaintiff Maud was not appointed to teach a class in the night school at the State University of New York for the fall semester commencing 1964 because of the said such failure on his part. He would have earned $500.00 if he would have been appointed to teach those classes.

35. On June 10, 1965, at a regular meeting of the Board of Trustees of State University of New York, duly called, and at which a quorum was present and acted throughout, there were unanimously adopted two resolutions of which true and correct copies are hereto attached as Exhibit "18".

[fol. 28] 36. Upon the facts stipulated herein, if it becomes necessary to bring charges against plaintiffs, except plaintiffs Keyishian and Starbuck, leading to the termination of their employment, such charges will be based upon the refusal of those plaintiffs to follow the proscribed procedures of defendant Board of Trustees of the State Uni-

versity of New York, in respect to compliance with the Feinberg Law.

Dated: July , 1965.

Lipsitz, Green and Fahringer, By: Richard Lipsitz, Attorneys for Plaintiffs.

John C. Crary, Jr., State University Counsel.

Louis J. Lefkowitz, Attorney General of the State of New York, attorney in this action for defendants Board of Regents of the University of the State of New York, Arthur Levitt, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone and Alexander A. Falk, and not for defendants Board of Trustees of the State University of New York, State University of New York at Buffalo, Clifford C. Furnas, J. Lawrence Murray and Samuel B. Gould, agrees that this stipulation constitutes the record of fact in this case which would have been made by plaintiffs and defendants Board of Trustees of the State University of New York, State University of New York at Buffalo, Clifford C. Furnas, J. Lawrence Murray and Samuel B. Gould, had a trial taken place.

Louis J. Lefkowitz, Attorney General of New York State.

[fol. 29]

EXHIBIT "1" TO STIPULATION OF FACT

The membership of the State University of New York at Buffalo Chapter of the American Association of University Professors met on January 24, 1964 to consider its position in relation to the Feinberg disclaimer certificate required by the Board of Trustees of the State University of New York. It accepted in *toto* the report from its Committee on

Academic Freedom and Tenure. In view of the fact that, in requiring the disclaimer, the State University is acting in response to statutory mandates, the Chapter did not recommend non-compliance by its members. It did, however, adopt the following resolutions:

RESOLUTION

Whereas: Determination of the fitness of faculty persons to teach is a responsibility of an educational institution and relevant inquiry for purposes of such determination is proper; however, any criteria of fitness should be formulated by the faculty and determination of satisfaction of these criteria should be undertaken within the academic community by the faculty.

Whereas: Inquiry into fitness to teach should follow scrupulously the tenets of academic due process and, in general, no single factor should be decisive.

Now, therefore, be it resolved that this Chapter disapproves of the external imposition of a disclaimer requirement as a condition for faculty membership on the ground that it violates these principles; and it objects more broadly to the imposition of disclaimer requirements, believing them to be inconsistent with fundamental standards of academic freedom and scholarly inquiry.

RESOLUTION

Whereas: The Chapter recognizes that some persons, for a variety of reasons, may not comply with the disclaimer requirement.

Now, therefore, be it resolved that the Chapter be vigilant in the protection of the rights of such persons as members of the academic community and directs its officers and appropriate committees to act in this regard.

RESOLUTION

Whereas: The Chapter opposes on principle the disclaimer requirement and the procedures that have led to its imposition.

Now, therefore, be it resolved that the Chapter formally protests against this requirement to the Board of Trustees of the State University of New York and directs the Executive Committee of this Chapter to pursue other avenues for the remedy of a basically unsatisfactory situation.

[fol. 30]

EXHIBIT "2" TO STIPULATION OF FACT

College of Arts and Sciences

Office of the Dean

February 14, 1964

To: Mr. Harry Keyishian

From: Milton C. Albrecht, Dean

In accordance with the policies of the State University Board of Trustees, I am hereby notifying you that it is our intent not to renew your appointment to the faculty of the College of Arts and Sciences for the academic year, 1964-65.

If conditions should exist which would require reconsideration of this action, please inform the chairman of your department, so that he may initiate appropriate procedures.

Although this notice is required, so that it is inevitably formal and legalistic, I would like you to know that I appreciate the services you have rendered the College and our University, and that I wish you well.

MCA/jf

[fol. 31]

EXHIBIT "3" TO STIPULATION OF FACT

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

• • • • • • • • • • • • • • • • • • •

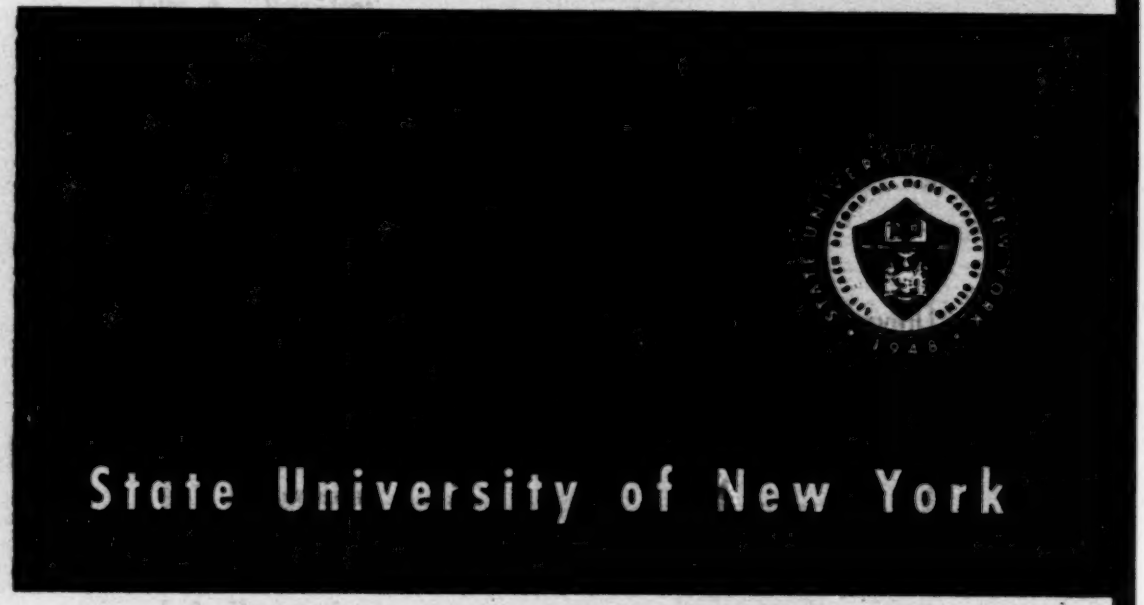
This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

_____ _____

Date Signature

[fol. 32]

EXHIBIT "4" TO STIPULATION OF FACT



POLICIES of the BOARD OF TRUSTEES

STATE UNIVERSITY OF NEW YORK

Policies of the

Board of Trustees

relating to

University Officers, University Faculty, Faculty Senate, College Officers and Organization, College Faculty, Appointment of Academic Staff, Recruitment, Promotion, Transfer, Leaves of Absence, Terminations of Service, and Retirement

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Articles III, V, and VIII were originally reserved by the Board of Trustees to set forth their policies on University Responsibility and Organization; University Conferences and Committees; and Councils, respectively.

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Article I
CONSTRUCTION AND APPLICATION

§ 1. *Construction.* These Policies are a general statement of policy only and shall in no way limit the authority of the Board of Trustees with respect to any matter contained herein. Notwithstanding anything contained in these Policies, the Board of Trustees shall retain full and unrestricted power and authority to appoint, reappoint, or terminate the services of any member of the academic or non-academic staff of the University, to modify these Policies in whole or in part, and to otherwise conduct the affairs of the University.

§ 2. *Application.* These Policies shall apply only to the State-operated colleges of the University, except where the statutory or contract colleges are specifically included.

Article II
DEFINITIONS

§ 1. *Terms.* As used in these Policies, unless otherwise specified, the following terms shall mean:

(a) "University." State University of New York.

(b) "Board of Trustees." The Board of Trustees of State University of New York.

(c) "President." The President of State University of New York.

(d) "College." A State-operated institution of State University of New York as enumerated in Article III, Title A, Section 1, Paragraph (a) of these Policies.

(e) "Contract college." A statutory or contract college of State University of New York as enumerated in Article III, Title A, Section 1, Paragraph (b) of these Policies.

(f) "Council." A council for a college as provided for by Section 356 of the Education Law.

[fol. 41]

(g) "Chief administrative officer." The head of a college or contract college, as the case may be, whether called president, dean, provost, director or otherwise.

(h) "Academic staff." The staff comprised of those persons having full academic rank or qualified academic rank.

(i) "Full academic rank." Rank held by those members of the academic staff having the titles of professor, institute professor, associate professor, institute associate professor, assistant professor, institute assistant professor, instructor, institute instructor, assistant instructor and institute assistant instructor, including geographic full-time faculty members having such titles. A geographic full-time faculty member is a person serving on the faculty of a medical center who is not employed on a full-time basis for the purpose of fixing compensation payable by the State but all of whose professional services and activities are conducted at the medical center or its affiliated hospitals and are available to the State on a full-time basis for clinical and instructional purposes.

(j) "Qualified academic rank." Rank held by those members of the academic staff having titles of full academic rank preceded by the designations "clinical" or "visiting," or other titles followed by titles of full academic rank in parentheses.

Article IV

UNIVERSITY OFFICERS

Title A. President

§ 1. *Appointment.* The President shall be appointed by the Board of Trustees and shall serve at its pleasure.

§ 2. *Chief Executive Officer.* The President shall be the chief executive officer of the University. He shall execute and enforce these Policies and shall perform such other duties as may be assigned by the Board of Trustees. The President shall make all appointments of employees, other than officers, to positions in the central office of the University in the classified service of the civil service of the State.

[fol. 42]

§ 3. *Assignment of Powers and Duties.* The President may assign to the officers, faculty and staff of the University powers, duties and responsibilities, and they shall be responsible to him and the Board of Trustees for the performance thereof, as well as for those powers, duties and responsibilities specifically vested in them by these Policies.

§ 4. *Committees.* The President may establish and appoint such *ad hoc* University committees as he may deem advisable to assist him in the development of specific programs and policies in the administration of the University. He shall be a member, *ex officio,* of all such committees.

§ 5. *Annual Report.* On or before December first of each year, the President shall make an annual report to the Board of Trustees for the previous year, concerning the affairs of the University and his recommendations with respect thereto.

Title B. Secretary of the State University

§ 1. *Appointment.* The Secretary of the State University shall be appointed by the Board of Trustees and shall serve at its pleasure.

§ 2. *Responsibilities.* The Secretary of the State University shall serve as secretary of the Board and its committees, shall keep records of their proceedings and shall furnish minutes of such proceedings to the members of the Board and its committees, respectively. He shall be the custodian of the University seal. He shall also maintain a complete file of all reports of the Board and its committees and perform such other duties as may be assigned by the Board or any of its committees. He shall perform such other powers and duties and have such other responsibilities, not inconsistent with his responsibilities to the Board of Trustees, as may be assigned by the President.

Title C. State University Counsel

§ 1. *Appointment.* The State University Counsel shall be appointed by the Board of Trustees upon recommendation of the President and shall serve at the pleasure of the Board.

§ 2. *Responsibilities.* The State University Counsel shall be the legal adviser to the University. He shall provide legal advice and

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opinions for the Board of Trustees and officers of the University on matters concerning University affairs. He shall, when requested by the Board of Trustees or the President, conduct negotiations and prepare legal documents for the University. He shall, when requested by the Board of Trustees or the President, represent the University in legal actions.

Title D. Executive Officers

§ 1. *Designation.* In addition to the President, the executive officers of the University shall be the Vice-President for Administration, Provost, Executive Dean for Teacher Education, Executive Dean for Institutes and Community Colleges, Controller, and University Architect.

§ 2. *Appointment.* The Board of Trustees shall appoint all executive officers of the University. The President shall bring recommendations for the appointment of such officers to the Board of Trustees.

Title E. University Administrative Officers

§ 1. *Designation.* In addition to the University executive officers there shall be such University administrative officers as may be determined by the President with the consent of the Board of Trustees.

§ 2. *Appointment.* Appointments of University administrative officers at annual base salaries of under $15,000 shall be made by the President, and such appointees shall serve at his pleasure. Appointments of University administrative officers at annual base salaries of $15,000 or more shall be made by the Board of Trustees, after receiving the recommendation of the President, and such appointees shall serve at the pleasure of the Board of Trustees.

§ 3. *Responsibilities.* University administrative officers shall have such powers, duties and responsibilities as may be assigned by the President.

Article VI
UNIVERSITY FACULTY

§ 1. *Composition.* The University faculty shall be comprised of the President, who shall be the presiding officer, the Vice-President for Administration, the Provost, the executive deans, the chief ad-

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ministrative officer of each college and all members of the academic staff of the University.

§ 2. *Voting Faculty.* The President, the Vice-President for Administration, the Provost, the executive deans, the chief administrative officer of each college and those members of the academic staff having full academic rank, except instructors and institute instructors with less than one year of service within the University, assistant instructors, institute assistant instructors and persons having temporary appointments, shall be voting members of the University faculty, each of whom shall be entitled to one vote.

§ 3. *Responsibilities.* The University faculty shall be responsible for the conduct of the University's instruction, research and service programs.

Article VII

FACULTY SENATE

Title A. Establishment and Purposes

§ 1. *Name.* There shall be a Faculty Senate of State University of New York.

§ 2. *Purposes.* The Senate shall serve the following University-wide purposes:

a. To study matters relating to over-all University faculty and educational problems and educational policies and programs and in those areas:

1. To provide an opportunity for the faculties of the University to act in an advisory, consultative, and planning capacity to the President of the University.

2. To provide a forum for the consideration of matters of mutual interest to the faculties of the University.

3. To provide a means for the interchange of ideas among the faculties of the University and between the faculties and the University administration.

b. To serve such other functions as may be determined by the President of the University and the Senate, and approved by the Board of Trustees.

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Title B. Membership

§ 1. *Composition.* The Senate shall consist of the President of the University, two University representatives having University-wide responsibilities, four faculty representatives from the State University of New York at Buffalo, and one faculty representative from each of the remaining State-operated units and contract colleges.

§ 2. *Election and Appointment.* The President of the University shall appoint the two University representatives. The faculty of each State-operated unit and contract college shall, by secret ballot and majority vote, elect their own representatives. Such representatives shall be elected from a slate of two or more candidates nominated by secret ballot or by an elected faculty nominating committee.

§ 3. *Alternates.* The President of the University shall also appoint two alternate University representatives having University-wide responsibilities. The faculty of each State-operated unit and contract college shall also elect alternate representatives. Such appointments shall be made and elections held at the same time and in the same manner as for regular representatives. Alternative representatives shall serve for the same terms as the representatives for whom they are alternates. Alternate representatives shall serve in the absence or inability to act of the representatives for whom they are alternates and, in that event, such alternate representatives shall have and exercise all the powers and duties of the representatives for whom they are alternates.

§ 4. *Terms.* The University representatives shall serve at the pleasure of the President of the University. Each representative of a State-operated unit or contract college faculty shall serve for a term of three years; provided, however, that no such representative shall serve as a member of the Senate after the termination of his status as a member of the faculty of the State-operated unit or contract college from which he was elected.

§ 5. *Re-election.* No representative of a State-operated unit or contract college faculty who has served a full three-year term as a member of the Senate shall be eligible to serve again as a member of the Senate until the expiration of one year from the end of his last preceding term. This section shall not be applicable to alternate representatives.

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§ 6. *Vacancies.* In the event that a Senator is to be away from the campus on leave of absence for a period in excess of one academic year, the appropriate faculty will hold another election to fill his unexpired term in the same manner as the original election. In this instance, it is to be understood that his alternate would be eligible to succeed him if elected. The foregoing provision would also apply in the case of a vacancy of similar duration in the position of alternate. In the event that both the Senator and his alternate are simultaneously away from the campus on sabbatical or other leave of absence for a period in excess of four months during the academic year, the appropriate faculty will hold another election to fill the unexpired terms.

Title C. Officers

§ 1. *Chairman.* The President of the University shall serve as Chairman of the Senate. He shall be the presiding officer of the Senate.

§ 2. *Vice-Chairman.* Beginning with the term commencing on July 1, 1963, the Senate shall elect one of its members to serve as Vice-Chairman for a term of two years. The Vice-Chairman shall serve as, and exercise the powers and duties of, the Chairman during the Chairman's absence or inability to act. He shall exercise such other powers and duties as may be delegated to him by the Chairman. No person shall be eligible to serve as Vice-Chairman until he has served as a regular member of the Senate for at least one year. Any regular member of the Senate shall be eligible to serve as Vice-Chairman for one year beyond the expiration of his three-year term as Senate member. In such case, the Vice-Chairman shall become a non-voting member of the Senate and his faculty shall be represented by his regularly-elected successor.

§ 3. *Secretary.* The Senate shall elect one of its members to serve as Secretary for a term of one year commencing the first day of July. However, beginning with the term commencing on July 1, 1964, the Senate shall elect one of its members to serve as Secretary for a term of two years. The Secretary shall make and keep minutes of the Senate and shall be custodian of all other records of the Senate and shall serve as a voting member of and secretary to each of the standing committees of the Senate. He shall exercise such other powers and duties as may be delegated to him by the Chairman. No person shall

be eligible to serve as Secretary until he has served as a regular member of the Senate for at least one year. Any regular member of the Senate shall be eligible to serve as Secretary for one year beyond the expiration of his three-year term as Senate member. In such case, the Secretary shall become a non-voting member of the Senate and his faculty shall be represented by his regularly elected successor.

§ 4. *Vacancies.* A vacancy in the office of Vice-Chairman or Secretary shall be filled for the unexpired term in the same manner as the original election, at the next succeeding meeting of the Senate following the occurrence of the vacancy. In the interim the Chairman may designate a member of the Senate to serve in an acting capacity until the vacancy is filled.

Title D. Meetings

§ 1. *Regular Meetings.* Regular meetings of the Senate shall be held twice a year at such times and places as may be designated by the Chairman.

§ 2. *Special Meetings.* Special meetings of the Senate may be called by the Chairman, in his discretion, and shall be called by him upon the written request of the Executive Committee or at least one-fourth of the members of the Senate. The Chairman shall designate the times and places of such special meetings.

Title E. Committees

§ 1. *Executive Committee.* There shall be an Executive Committee which shall be comprised of the Senate Chairman, Vice-Chairman, Secretary and one of the two University representatives, whom the Chairman shall designate to serve, and five other members of the Senate who shall be elected by the Senate. Such elected representatives shall serve for terms of one year commencing July 1 of each year. They shall be eligible for reappointment. The Vice-Chairman shall serve as Chairman of the Executive Committee. The Executive Committee shall exercise such powers and duties as may be conferred upon it by the Senate.

§ 2. *Standing Committees.* The Senate may establish such other standing committees as it deems advisable and shall prescribe the functions of such committees. The chairman and members of such standing committees shall be appointed by the Executive Committee

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and shall serve for terms of one year commencing July 1 of each year. They shall be eligible for reappointment. The Chairman of the Senate, the Secretary of the Senate, and one of the two University representatives whom the Chairman shall designate to serve shall also be members of every standing committee.

§ 3. *Ad Hoc Committees.* The Senate may establish such *ad hoc* committees as it deems advisable and shall prescribe the functions of such committees. The chairmen and members of such committees shall be appointed by the Chairman of the Senate and shall serve until the committee is discharged by action of the Senate. The Chairman of the Senate and one of the two University representatives whom he shall designate to serve shall also be members of every *ad hoc* committee.

§ 4. *Reports.* All committee reports shall be addressed and made to the Senate.

Title F. By-Laws

§ 1. *Adoption.* The Senate may adopt, amend or repeal such by-laws as it deems advisable, consistent with this Article VII, governing its activities and procedures.

Title G. Amendments

§ 1. *Procedure.* Proposed amendments to this Article VII may be recommended to the Board of Trustees by a majority vote of the members of the Senate, ratified by the faculties of three-fourths of the State-operated units and contract colleges, by secret ballot, and approved by the President of the University.

Article IX

COLLEGE OFFICERS AND ORGANIZATION

Title A. Chief Administrative Officer

§ 1. *Appointment.* There shall be a chief administrative officer of each college. He shall be appointed by the Board of Trustees, after receipt of the recommendations of the President and the college council, and shall serve at the pleasure of the Board of Trustees. Before making their recommendations the President and the college

council shall consult with the committee of the college faculty designated for such purpose by the faculty.

§ 2. *Responsibilities.* The chief administrative officer of each college shall be responsible to the President and the Board of Trustees for, and shall administer, the college for which he serves, and shall promote its development and effectiveness. He shall supervise the members of the academic and non-academic staff of such college. He shall recommend to the President and the Board of Trustees persons for appointment as members of the academic staff of the college. He shall prepare and recommend the annual budget requests of the college. He shall report and make recommendations to the President and the Board of Trustees and the college council concerning the operation, plans and development of the college. He shall make all appointments of employees, other than officers, to positions at his college in the classified service of the civil service of the State.

§ 3. *Communications to President.* The chief administrative officer of each college shall transmit his communications and recommendations to the President through the appropriate executive dean, but this provision shall not be construed to preclude direct communication between him and the President.

§ 4. *Handbook.* The chief administrative officer of each college shall be responsible for the preparation and publication of a college handbook, subject to the approval of the President. Such handbook should include an administrative organization chart, a statement of administrative responsibilities, faculty by-laws, local policies and such other information concerning the college as he may deem advisable and shall be made available to all members of the academic staff of the college.

§ 5. *Annual Reports.* On or before September 1 of each year the chief administrative officer of each college shall make an annual report to the Board of Trustees and the President and the college council for the previous year, concerning the affairs of the college and his recommendations with respect thereto.

Title B. College Administrative Officers

§ 1. *Designation.* There shall be such college administrative officers for each college as may be determined by the President, after

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receiving the recommendation of the chief administrative officer of the college.

§ 2. *Appointment.* Appointments of college administrative officers at annual base salaries of under $15,000 shall be made by the President, after receiving the recommendation of the chief administrative officer of the college concerned, and such appointees shall serve at the pleasure of the President. Appointments of college administrative officers at annual base salaries of $15,000 or more shall be made by the Board of Trustees, after receiving the recommendation of the President, which recommendation shall be made by him after receiving the recommendation of the chief administrative officer of the college, and such appointees shall serve at the pleasure of the Board of Trustees.

§ 3. *Responsibilities.* College administrative officers shall have such powers, duties and responsibilities as may be assigned by the chief administrative officer of the college.

Title C. Chairmen of Departments and Divisions

§ 1. *Designation.* The members of the academic staff of each college in charge of the departments or divisions of such college shall be designated as chairmen of such departments or divisions, which designations shall be in addition to their academic rank.

§ 2. *Term.* Chairmen of departments or divisions of colleges shall be designated by the President, after receiving the recommendation of the chief administrative officer of the college. Such designations shall be for renewable periods of three years; provided, however, that the President may relieve a designee of his duties as chairman at any time.

§ 3. *Termination of Appointment as Chairman.* If the Chairman of a department or division of a college is relieved of his duties as chairman he shall, unless otherwise provided by the Board of Trustees, retain such rights and privileges as he may have by virtue of his academic rank.

§ 4. *Responsibilities.* The chairmen of departments and divisions of a college shall be responsible to the chief administrative officer of the college for the supervision of the personnel and educational program of the departments or divisions for which they serve.

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They shall have such other powers, duties and responsibilities as may be assigned by the chief administrative officer of the college.

Title D. College Administrative Organization

§ 1. *Plan.* The chief administrative officer of each college shall prepare an organization chart of the college and an accompanying description of the powers, duties and responsibilities of the administrative officers and chairmen of the departments and divisions of the college, subject to the approval of the President.

Title E. College Administrative Conference

§ 1. *Composition.* There shall be a college administrative conference of each college which shall be comprised of the President, the executive dean having jurisdiction over the college, the chief administrative officer of the college, the chairmen of the departments and divisions of the college and such other persons as may be designated by the chief administrative officer of the college. The President, in his absence the executive dean having jurisdiction over the college, and in the absence of both, the chief administrative officer of the college, shall be the presiding officer of each college administrative conference.

§ 2. *Purpose.* Each college administrative conference shall act as an advisory and consultative body to the chief administrative officer of the college and it shall consider such matters as may be presented to it by its presiding officer.

§ 3. *Meetings.* Each college administrative conference shall meet at the call of the chief administrative officer of the college.

Title F. Distinguished Service Professors

§ 1. *Designation.* Members of the academic staff holding continuing appointments as professors who have distinguished themselves in their profession may be designated as distinguished service professors, by action of the Board of Trustees.

§ 2. *Privileges.* Designation as a distinguished service professor shall be an honorary designation only, and shall not carry with it any other rights or privileges.

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Article X

COLLEGE FACULTY

§ 1. *Composition.* The faculty of each college shall be comprised of the President, the executive dean having jurisdiction over the college, the chief administrative officer of the college, the members of the academic staff of the college, and college administrative officers other than the chief administrative officer whose positions are in the unclassified service.

§ 2. *Presiding Officer.* The President, in his absence the executive dean having jurisdiction over the college, and in the absence of both, the chief administrative officer of the college, shall be the presiding officer of the faculty of each college.

§ 3. *Voting Faculty.* The President, the executive dean having jurisdiction over the college, the chief administrative officer of the college, college administrative officers other than the chief administrative officer whose positions are in the unclassified service and those members of the academic staff of the college having full academic rank, except instructors and institute instructors with less than one year of service in the college, assistant instructors, institute assistant instructors and persons having temporary appointments shall be voting members of the faculty of such college, each of whom shall be entitled to one vote.

§ 4. *Responsibility.* The faculty of each college shall participate in the development of the educational program of the college and shall be responsible for the conduct of the college's instruction, research and service programs.

§ 5. *By-Laws.* The faculty of each college shall prepare and adopt by-laws which shall contain certain provisions for committees and their responsibilities, procedures for the calling and conduct of faculty meetings and elections and provisions for such other matters of organization and procedure as may be necessary for the performance of their responsibilities. Such by-laws, and amendments thereof, shall be subject to the approval of the chief administrative officer of the college, the Board of Trustees and the President.

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Article XI

APPOINTMENT OF ACADEMIC STAFF

Title A. Types of Appointment

§ 1. *Continuing Appointment.* A continuing appointment shall be a full-time, including geographic full-time, appointment to a position of full academic rank for an indefinite period which, once granted, shall not be affected by changes in such rank and shall continue until terminated in accordance with these Policies.

§ 2. *Term Appointment.* A term appointment shall be an appointment to the academic staff for a specified, limited period which, except as otherwise provided for by these Policies, shall automatically expire at the end of that period, unless terminated earlier in accordance with these Policies.

§ 3. *Temporary Appointment.* A temporary appointment shall be an appointment to the academic staff for a temporary, unspecified period, which may be terminated at will at any time.

Title B. Methods of Appointment

§ 1. *Continuing or over $15,000.* Continuing appointments and appointments to the academic staff at an annual base salary of $15,000 or more shall be made by the Board of Trustees, after receiving the recommendation of the President, which recommendation, in the case of an appointment to the academic staff of a college, shall be made by him after receiving the recommendation of the chief administrative officer of the college.

§ 2. *Other.* All other appointments to the academic staff shall be made by the President, which, in the case of an appointment to the academic staff of a college, shall be made by him after receiving the recommendation of the chief administrative officer of the college. The President shall report all such appointments to the Board of Trustees.

§ 3. *Procedure for Appointments.* All appointments to the academic staff on or after October 11, 1956 shall be made only upon compliance with the Procedure on New Academic Appointments, adopted by the Board of Trustees at its regular meeting of October 11, 1956.

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Title C. Periods of Appointment

§ 1. *Professors, Institute Professors, Associate Professors and Institute Associate Professors.* Professors, institute professors, associate professors and institute associate professors, serving on a full-time basis, who have not otherwise been granted a continuing appointment, shall be granted either a continuing appointment or a term appointment for a period of not exceeding three years. Reappointment at the end of such a term appointment shall be a continuing appointment.

§ 2. *Assistant Professors and Institute Assistant Professors.* Assistant professors and institute assistant professors, serving on a full-time basis, who have not otherwise been granted a continuing appointment pursuant to Section 3 of this Title C, shall be granted term appointments for periods of not exceeding three years, which may be renewed.

§ 3. *Eligibility for Continuing Appointment.* Notwithstanding anything contained in this Title C, when an assistant professor or an institute assistant professor holding a term appointment has completed seven consecutive years of service within the University in the position of assistant professor or institute assistant professor, or a combination thereof, his term appointment shall be deemed to be terminated as of that time, he shall no longer be eligible for a term appointment and he shall thereupon be considered for a continuing appointment. Reappointment at the end of such seven-year period of service shall be a continuing appointment. In computing consecutive years of service for the purpose of this Section 3, periods of vacation leave, periods of sick leave with salary and periods of sabbatical leave, shall be included; periods of leaves of absence other than vacation leave, sick leave with salary and sabbatical leave, and periods of part-time service, shall not be included, but shall not be deemed an interruption of otherwise consecutive service.

§ 4. *Instructors, Institute Instructors, Assistant Instructors and Institute Assistant Instructors.* Instructors, institute instructors, assistant instructors and institute assistant instructors, serving on a full-time basis, shall be granted term appointments for periods of not exceeding three years, which may be renewed.

§ 5. *Qualified Academic Rank.* Persons holding qualified academic rank, and who are serving on a full-time basis, shall be granted

term appointments with respect to such qualified academic rank for periods of not exceeding three years, which may be renewed; provided, however, that upon the termination of the services of such persons in their other positions within the University, such term appointments with respect to qualified academic rank shall be deemed terminated as of that time.

§ 6. *Temporary Service.* Persons having full or qualified academic rank who serve for temporary unspecified periods shall be granted temporary appointments.

§ 7. *Part-Time Service.* Persons having full or qualified academic rank who serve on a part-time basis shall be granted temporary appointments; provided, however, that members of the academic staff of a college of medicine serving on a part-time basis, who have been designated as chairmen of departments or divisions of such college, shall be granted term appointments for periods of not exceeding three years, which may be renewed.

Title D. Notices

§ 1. *Appointments, Reappointments and Changes in Status.* The President or his designee shall notify members of the academic staff promptly, in writing, of their appointments, reappointments, promotions, changes in status or other changes in the terms or conditions of their positions.

§ 2. *Term Appointments.* The President or his designee shall, in writing, notify members of the academic staff holding term appointments whether or not their terms will be renewed or, if they are eligible for continuing appointments, whether or not they will be granted continuing appointments. Such notices shall be given as far in advance as feasible and ordinarily not later than February 15 preceding the expiration of their terms for persons appointed for the regular appointment year, or a comparable length of time for other terms.

Title E. Salary Periods and Appointment Year

§ 1. *Ten- and Twelve-Month Salary Periods.* The annual salaries of members of the academic staff, other than persons having temporary appointments, shall be paid over periods of ten months or twelve months, as provided by the terms of their appointments and,

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unless terms and conditions of their appointments otherwise provide, all such persons shall be deemed to be serving full-time for the purposes of these Policies regardless of whether they are paid their annual salaries over periods of ten months or twelve months.

§ 2. *Appointment Year.* Unless terms and conditions of their appointments otherwise provide, the regular appointment year for members of the academic staff shall be from September 1 through August 31.

Title F. Nepotism

§ 1. *Prohibition.* No parent, child, brother, sister, husband or wife of any member of the academic or non-academic staff of any college, other than a full-time student employed on a part-time basis, shall be appointed to any position or employment at such college, except that where members serving on the academic or non-academic staff marry each other neither shall be disqualified by reason of this Section 1, but both shall not serve within the same department of the college.

§ 2. *Temporary Service.* Notwithstanding the prohibitions provided for by Section 1 of this Title F, persons may be employed on a temporary basis for periods of not to exceed one month, with the approval of the chief administrative officer of the college concerned.

§ 3. *Waiver.* The President may, in his discretion, waive the prohibitions provided for by Section 1 of this Title F in specific cases where he believes special circumstances warrant such waiver.

Title G. Academic Freedom

It is the policy of the University to maintain and encourage full freedom, within the law, of inquiry, teaching and research. In the exercise of this freedom the faculty member may, without limitation, discuss his own subject in the classroom; he may not, however, claim as his right the privilege of discussing in his classroom controversial matter which has no relation to his subject. In his role as citizen, the faculty member has the same freedoms as other citizens. He should be mindful, however, that in his extramural utterances he has an obligation to indicate that he is not an institutional spokesman.

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Article XII

RECRUITMENT, PROMOTION AND TRANSFER

Title A. Recruitment

§ 1. *Procedure.* The chief administrative officer of each college shall consult members of the college faculty in the recruitment and selection of prospective appointees to the academic staff of the college but he shall determine the persons to be recommended for appointment.

Title B. Promotion

§ 1. *Procedure.* The chief administrative officer of each college shall make recommendations to the President for promotions of members of the academic staff of such college. He shall consult members of the college faculty before making such recommendations. Each such recommendation for promotion shall be accompanied by a summary of the background, training, experience and accomplishments of the person recommended for promotion.

§ 2. *Evaluation.* The qualities to be considered in evaluating members of the academic staff for promotion shall be those which determine their effectiveness in performing their prescribed duties and their general contribution to the aims of the University. Specifically, such evaluations shall include consideration of such of the following factors as relate to the particular type of responsibility with which the faculty member is concerned:

(a) Mastery of subject matter—as demonstrated by such things as advanced degrees, licenses, honors and awards and reputation in the subject matter field.

(b) Effectiveness in teaching—as demonstrated by such things as judgment of colleagues, development of teaching materials or new courses and student reaction.

(c) Scholarly ability—as demonstrated by such things as success in developing and carrying out significant research work in the subject matter field, publications and reputation among colleagues.

(d) Effectiveness of university service—as demonstrated by such things as successful committee work, administrative work and

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work with students or community in addition to formal teacher-student relationships.

(e) Continuing growth—as demonstrated by such things as reading, research or other activities to keep abreast of current developments in his field and being able to handle successfully increased responsibility.

§ 3. *Eligibility.* No minimum length of service in any academic rank shall be required for eligibility for promotion.

Title C. Transfer

§ 1. *Policy.* Members of the academic staff who desire to transfer to vacancies in other colleges or contract colleges within the University shall be given consideration for such vacancies.

§ 2. *Consent.* No member of the academic staff shall be transferred to another college or contract college within the University without his consent.

§ 3. *Placement.* Members of the academic staff whose services are satisfactory but whose services are terminated because of change in program, lack of promotional opportunity or otherwise through no fault of their own and who desire to transfer to other colleges or contract colleges within the University shall be given special consideration for appointment to appropriate available positions in such other colleges.

Article XIII
LEAVES OF ABSENCE

Title A. Vacation Leave

§ 1. *Twelve-Month Salary Periods.* Members of the academic staff, serving on a full-time basis, other than persons having temporary appointments, who receive their annual salaries over periods of twelve months, shall be granted annual vacation leaves with full salary of one month during each year of their service within the University; provided, however, that such persons who, during any year, have served for less than one year and whose service has been terminated other than by resignation, shall be granted annual vacation leaves with full salary of periods computed on the basis of one-

eleventh of one month for each month of service. Members of the academic staff having term appointments and serving on a part-time basis shall be granted vacation leaves in accordance with this Section 1 on a pro-rated basis.

§ 2. *Ten-Month Salary Periods.* Members of the academic staff, other than persons having temporary appointments, who receive their annual salaries over periods of ten months, shall not be granted any annual vacation leaves with salary, but shall be granted annual vacation leaves without salary of two months during each year of their service within the University.

§ 3. *Academic Holidays.* Academic holidays regularly scheduled by each college during the academic year, in accordance with its program requirements, shall not be considered vacation leave, and vacation leave shall not be reduced by such academic holidays.

§ 4. *Accumulation.* Vacation leaves shall not be cumulative from year to year and shall be taken at such times as may be approved by the chief administrative officer of the college concerned.

Title B. Sick Leave

§ 1. *Authorization by College.* Members of the academic staff, other than persons having temporary appointments, who are unable to perform their regularly assigned duties because of illness, shall be granted sick leave with full salary by the chief administrative officer of the college concerned, for not to exceed a total of one month during each year of service within the University for those persons having one year or more of service within the University, and for not to exceed a total of one-half of a month for those persons having less than one year of service within the University.

§ 2. *Authorization by President.* The President, after receiving the recommendation of the chief administrative officer of a college, may grant members of the academic staff of such college, other than persons having temporary appointments, sick leave with full salary for not to exceed a total of three months during each year of service within the University.

§ 3. *Authorization by Board of Trustees.* The Board of Trustees, after receiving the recommendation of the President, may grant members of the academic staff, other than persons having temporary

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appointments, sick leave for not to exceed a total leave in any one case of two years, comprised of not more than six months with full salary, six months with half salary and one year without salary.

§ 4. *Substitutes.* During the absence on sick leave of members of the academic staff of a college, the chief administrative officer of such college shall make appropriate arrangements for carrying on the activities of such college with due regard to the reasonable work load of the other members of the academic staff, and such persons on sick leave shall not be required or permitted to contribute toward the salary of substitutes during their absence.

Title C. Maternity Leave

§ 1. *Report.* Members of the academic staff who become pregnant shall report the existence of their pregnancy to the chief administrative officer of their college as soon as possible, and ordinarily not later than the fourth month of pregnancy.

§ 2. *Leave.* The chief administrative officer of the college concerned shall grant such pregnant persons, other than persons having temporary appointments, a leave of absence without pay, effective at such date as he may determine, until one year after the birth of the child; provided, however, that such persons may return to service at an earlier date, with the approval of the chief administrative officer of the college.

§ 3. *Extension.* At the request of such a person, and after receiving the recommendation of the President, the Board of Trustees may grant further extensions of such leaves of absence.

§ 4. *Sick Leave.* Sick leave shall not be granted for maternity purposes.

Title D. Sabbatical Leave

§ 1. *Policy.* Sabbatical leaves for professional development may be made available to members of the academic staff who meet the requirements set forth in this Title D. The objective of such leave is to increase each such person's value to the University and thereby improve and enrich its program. Such leave shall not be regarded as a reward for service nor as a vacation or rest period occurring automatically at stated intervals.

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§ 2. *Purpose.* Sabbatical leaves shall be granted for planned travel, study, formal education, research, writing or other experience of professional value.

§ 3. *Eligibility.* Members of the academic staff having continuing appointments, who have completed at least six consecutive years of service within the University or who, if they previously have had a sabbatical leave, have completed at least six consecutive years of service within the University from the date of return from their last sabbatical leave, shall be eligible for a sabbatical leave. In computing consecutive years of service for the purpose of this Section 3, periods of vacation leave and periods of sick leave with salary shall be included; periods of leaves of absence other than vacation leave and sick leave with salary, and periods of part-time service, shall not be included, but shall not be deemed an interruption of otherwise consecutive service.

§ 4. *Terms and Conditions.* Sabbatical leaves may be granted for periods of one year at rates not to exceed one-half salary or for periods of one-half year at rates not to exceed full salary. Members of the academic staff on sabbatical leave may, with the prior approval of the President, accept fellowships, grants-in-aid or earned income to assist in accomplishing the purposes of their leaves. In such cases, the President may adjust the sabbatical leave salaries to reflect such income, either prior to or during the periods of such leave.

§ 5. *Applications.* Applications for sabbatical leaves shall be submitted to the chief administrative officer of the college concerned as far in advance as possible of the requested effective date of the leave, but in no event later than six months in advance unless such requirement is waived by the President. Each application shall include a statement outlining the program to be followed while on leave, indicating any prospective supplementary income, stating that the applicant intends to continue as a member of the academic staff upon his return and stating that upon his return the applicant will submit to the chief administrative officer of the college a report of his accomplishments while on sabbatical leave.

§ 6. *Approval.* If the chief administrative officer of the college approves the application, he shall forward it, together with his recommendations, to the President. The President may grant such sabbatical leaves as he deems appropriate and shall report to the Board all sabbatical leaves which he has granted.

[fol. 62]

§ 7. *Substitutes.* During the absence on sabbatical leave of members of the academic staff of a college, the chief administrative officer of such college shall make appropriate arrangements for carrying on the activities of such college with due regard to the reasonable work load of the other members of the academic staff, and such persons on sabbatical leave shall not be required or permitted to contribute toward the salary of substitutes during their absence.

Title E. Other Leaves

§ 1. *Approval.* The chief administrative officer of each college may grant members of the academic staff of such college, other than persons having temporary appointments, other leaves of absence without salary, for not to exceed a total of twelve months. The President, after receiving the recommendation of the chief administrative officer of such college, may grant such persons leaves of absence, without salary, for any additional period.

§ 2. *Application.* Applications for leaves of absence, without salary, shall be made to the chief administrative officer of the college concerned. Each such application shall include a statement of the purpose for which the leave is requested, its anticipated duration and its value to the applicant or the University. Leaves of absence granted shall be reported by the chief administrative officer to the President.

Title F. Limitations

§ 1. *Term Appointments.* Notwithstanding anything contained in this Article XIII, no leaves of absence shall be deemed to extend the terms of members of the academic staff having term appointments, and all leaves of absence shall, in any event, terminate upon the expiration of such terms.

Title G. College Administrative Officers

§ 1. *Leaves of Absence.* College administrative officers other than the chief administrative officer whose positions are in the unclassified service shall be entitled to the same leaves of absence provided in this article for members of the academic staff under the same terms and conditions and subject to the same limitations, except that for the purpose of determining their eligibility for sabbatical leaves such college administrative officers shall be deemed to have continuing appointments.

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Article XIV
TERMINATIONS OF SERVICE

Title A. Termination at Will

§ 1. *Temporary Appointments.* The services of members of the academic staff having temporary appointments may be terminated at will by the chief administrative officer of the college concerned, notwithstanding any other provision of this Article XIV. There shall be no right of appeal from such a termination.

Title B. Automatic Termination

§ 1. *Term Appointments.* The services of members of the academic staff having term appointments shall cease automatically at the end of their specified terms. There shall be no right of appeal from a non-renewal of a term appointment.

Title C. Termination for Age or for Physical or Mental Incapacity

§ 1. *Retirement.* The services of members of the academic staff may be terminated at any time for age or for physical or mental incapacity in accordance with Article XV, Title D, of these Policies.

Title D. Termination for Cause

§ 1. *Grounds.* The services of members of the academic staff may be terminated at any time for cause, which shall consist of inadequate performance of duties, misconduct or violation of these Policies, after such notice and opportunity to be heard as are provided for by this Title D.

§ 2. *Notice.* When the chief administrative officer of a college has information or receives a complaint against a member of the academic staff of such college containing allegations which, if true, might serve as grounds for dismissal for cause, and he deems such information or complaint to be substantial, he shall discuss it with the person concerned and shall make such further investigation as he deems appropriate. If he believes that charges should be brought against such person, he shall forward such information to the President together with his recommendation. If the President determines, after making such further investigation as he deems appropriate, that further action

[fol. 64]

is warranted, he shall cause to be served upon the person concerned a written statement of the charges against him.

§ 3. *Request for Hearing.* Final action shall not be taken on such charges until after the expiration of 30 days from the date of service of such notice upon the person charged, during which time he may make a written request to the President for a hearing before the University's Standing Committee on Terminations. If he makes such a request he shall be given a hearing as hereinafter provided. If the person charged does not request a hearing the President may direct that such a hearing be held. When a hearing has been requested or directed, final action on the charges shall not be taken until the hearing has been held and the matter presented to the Board of Trustees as hereinafter provided.

§ 4. *Conduct of Hearing.* No member of the Committee on Terminations shall serve in a case involving a member of the same academic staff of a college of which he is a member. The President or his designee, or both, may be present at the Committee hearing as an auditor, but shall not be present at or participate in the deliberations or decisions of the Committee. At such hearing, the faculty member charged shall be entitled to be present, to be represented by a person of his own choice, to present witnesses in his own behalf and to confront and question witnesses against him. All testimony at such hearing shall be under oath. A stenographic record shall be taken of each such hearing.

§ 5. *Failure to Testify.* If the person charged refuses to answer any question at the hearing pertinent to the charges against him, the Committee may regard such refusal as sufficient to warrant a recommendation that his services be terminated.

§ 6. *Findings and Recommendation.* Upon the completion of its hearing, the Committee shall make a written statement of its findings with respect to the charges and shall also make a written recommendation, and shall thereupon submit to the President the stenographic transcript of the proceedings, the statement of its findings and its recommendation.

§ 7. *Review by President.* Upon receipt of the stenographic transcript of the proceedings and the Committee's statement of findings and recommendation the President shall review and transmit them to the Board of Trustees along with his own recommendation. Where

[fol. 65]

no hearing was requested or held the President shall review the charges and make such investigation of the matter as he deems appropriate and transmit to the Board of Trustees a report of the matter together with his recommendation.

§ 8. *Action by Board.* Upon receipt of the recommendation of the President and the accompanying material as hereinbefore provided, the Board of Trustees shall review the matter and take such action, if any, as it deems advisable. There shall be no right of appeal from such action of the Board of Trustees.

§ 9. *Failure to Attend Hearing.* If the person charged fails to request or attend a hearing of the Committee, the Board of Trustees may, after receiving the recommendation of the President, take such action, if any, as it deems advisable. There shall be no right of appeal from such action of the Board of Trustees.

§ 10. *Suspension.* If the President deems it to be for the best interest of the University, a person upon whom charges have been served may be suspended by the President, with or without salary, pending final action upon such charges by the Board of Trustees. If a person against whom charges have been served is suspended without salary and subsequently is reinstated to his position by action of the Board of Trustees and no disciplinary action against him is taken by the Board of Trustees, he shall be paid the salary which he otherwise would have received during the period of such suspension.

Title E. Termination for Retrenchment

§ 1. *Budget or Program Curtailment.* The services of any members of the academic staff may be terminated in the event of financial or program retrenchment. If the President anticipates that such retrenchment may be necessary, he shall seek the advice of the Faculty Senate concerning the policy to be followed in the reduction of staff.

Article XV
RETIREMENT

Title A. Membership in Retirement Systems

§ 1. *Requirement.* Members of the academic staff, other than persons having temporary appointments, shall, if eligible, become

[fol. 66]

members of either the New York State Employees Retirement System or the New York State Teachers Retirement System, or shall elect the Optional Retirement Program.

Title B. Mandatory Retirement

§ 1. *Age.* Members of the academic staff shall be retired and their services terminated on the thirty-first day of August next succeeding their reaching age seventy. Administrative and executive officers of the University and of the institutions therein, if their services have not otherwise terminated prior thereto, shall be retired and their services terminated on the thirty-first day of August next succeeding their reaching age sixty-five, except that the service of any such officer may be continued on a year to year basis between age sixty-five and age seventy upon the recommendation of the President of the University and with the approval of the Board of Trustees.

Title C. Voluntary Retirement

§ 1. *Notice.* Members of the academic staff who wish to retire at an age earlier than seventy under the provisions of the retirement systems of which they are members shall, prior to applying for such retirement, notify and consult with the chief administrative officer of the college concerned with respect to the effective date of such retirement.

Title D. Retirement for Physical or Mental Incapacity

§ 1. *Policy.* Members of the academic staff may be retired and their services terminated by the Board of Trustees, after receipt of the recommendation of the President and upon medical advice, for mental or physical incapacity which prevents such persons from adequately performing their duties.

Title E. Emeritus Status

§ 1. *Eligibility.* Members of the academic staff, other than those having temporary appointments, who retire because of age in accordance with the provisions of Title B or C of this Article XV or who are retired because of incapacity in accordance with the provisions of

[fol. 67]

Title D of this Article XV, may be granted emeritus their academic rank as of the time of their retirement, by action of the Board of Trustees.

§ 2. *Privileges.* Academic rank emeritus shall be an honorary designation only, and shall not carry with it any other rights or privileges.

[fol. 68]

STATE UNIVERSITY OF NEW YORK

Central Administrative Office: Albany 1, N. Y.

University Centers

State University at Albany
State University at Buffalo
State University at Stony Brook

Medical Centers

Downstate Medical Center at Brooklyn (New York City)
Upstate Medical Center at Syracuse

Graduate School

Graduate School of Public Affairs at Albany

Colleges

College at Brockport
College at Buffalo
College at Cortland
College at Fredonia
College at Geneseo
College at New Paltz
College at Oneonta
College at Oswego
College at Plattsburgh
College at Potsdam
Harpur College at Binghamton
College of Forestry at Syracuse University
Maritime College at Fort Schuyler (Bronx)
College of Ceramics at Alfred University
College of Agriculture at Cornell University
College of Home Economics at Cornell University
School of Industrial and Labor Relations at Cornell University
Veterinary College at Cornell University

Two-Year Colleges

Agricultural and Technical Institutes at: Alfred, Canton, Cobleskill, Delhi, Farmingdale, Morrisville

Community Colleges

(Locally-sponsored two-year colleges under the program of State University)

Adirondack Community College at Hudson Falls
Auburn Community College at Auburn
Borough of Manhattan Community College at New York City
Bronx Community College at New York City
Broome Technical Community College at Binghamton
Corning Community College at Corning
Dutchess Community College at Poughkeepsie
Erie County Technical Institute at Buffalo
Fashion Institute of Technology at New York City
Fulton-Montgomery Community College at Johnstown
Hudson Valley Community College at Troy
Jamestown Community College at Jamestown
Jefferson Community College at Watertown
Kingsborough Community College at Brooklyn
Mohawk Valley Community College at Utica
Monroe Community College at Rochester
Nassau Community College at Garden City
New York City Community College of Applied Arts and Sciences at Brooklyn
Niagara County Community College at Niagara Falls
Onondaga Community College at Syracuse
Orange County Community College at Middletown
Queensborough Community College at New York City
Rockland Community College at Suffern
Staten Island Community College at New York City
Suffolk County Community College at Selden
Sullivan County Community College at South Fallsburg
Ulster County Community College at Kingston
Westchester Community College at Valhalla

delayed because of forwarding my new address 24 __1 St.

STATE UNIVERSITY OF NEW YORK
ALBANY 1, N. Y.

OFFICE OF THE PRESIDENT

January 28, 1965

Mr. Ralph Maud
107 Lexington Avenue
Buffalo 22, New York

Dear Mr. Maud:

I am pleased to inform you that the Board of Trustees of State University of New York has, upon recommendation, granted you an appointment as Associate Professor of English, with continuing status at State University of New York at Buffalo effective January 1, 1965 at an annual salary of $9,596, subject to such changes as may be authorized or required by law during your incumbency.

It must be understood that this is in pursuance of my direction that you should not be prejudiced as to normal employment rights and advancement in due course pending the determination of questions which have arisen because of your refusal to comply with the University's requirements respecting its responsibilities under Section 3022 of the Education Law. Your status will be subject to the disposition of any charges which may be made against you for such refusal as affected by the ultimate outcome of the pending litigation to which you are a party.

This appointment is offered to you under the terms of the Policies of the Board of Trustees, a copy of which is available in the college library.

If you wish to accept the appointment, please sign the acceptance endorsed upon the enclosed copy of this letter and return it at your earliest convenience to President Clifford C. Furnas at the State University of New York at Buffalo.

Sincerely yours,

Samuel B. Gould
President

I hereby accept the foregoing appointment.

11 February 1965 (Date)

Ralph N. Maud (Signature)

Italicised material handwritten note.

[fol. 70]

EXHIBIT "5A" TO STIPULATION OF FACT

November 4, 1964

Dr. Clifford C. Furnas
President
State University of New
York at Buffalo
3435 Main Street
Buffalo, New York 14214

Dear Cliff:

Since assuming office on September 1, I have endeavored to inform myself fully concerning difficulties which have arisen at Buffalo with respect to the refusal by some of your faculty members to submit the certificate required by the Policies of the State University Trustees for the purpose of carrying out their duties under State laws prohibiting the employment of those who advocate the violent overthrow of government. I have now had opportunity to complete a review of the pertinent papers and to discuss the entire matter with those who have been concerned with it pending the appointment of a President.

First let me observe that there appears to have been patient effort both on your part and on the part of the central staff here to deal with the objections raised by the faculty members on a reasoned and responsive basis. I find extensive correspondence seeking to explain the statutory provisions and the limitations of the certificate to the purpose of obtaining information needed to furnish a reasonable basis for compliance on the part of the University. In the case of three faculty members who have term appointments with varying periods still to run, there now appears to be a final determination that they will not comply with the University's requirements. These three, with two others, instituted an action in Federal court seek-

ing a determination of the unconstitutionality of the New York statutes which lie at the heart of the matter. The action was commenced prior to my taking office but resulted shortly thereafter in a decision dismissing the complaint which is now on appeal to the United States Court [fol. 71] of Appeals. The two plaintiffs other than the term appointees are no longer employed by State University. One of them, Keyishian, had a term faculty appointment which has expired. He had been properly informed prior to the expiration of his term that he would not be given a new appointment and I cannot find that he has any employment status or rights. The other, Starbuck, was employed in a position in the classified civil service under a temporary certification by the Civil Service Department, which gave him no tenure. When that certification expired, the University no longer had any authority to continue him in its employment.

The three remaining plaintiffs, as you know, are George Hochfield, Ralph Maud and Newton Garver, each of whom is now teaching under the term appointment which he holds. They should not, and will not, be prejudiced because they have invoked the orderly processes of the law to obtain a determination of the validity of the basic statutory provisions. This is so even though those provisions have heretofore been sustained by the Supreme Court of the United States and the administrative officers of State University cannot conscientiously do less than follow the procedures prescribed by its governing board for compliance therewith. The Federal court has denied any temporary injunctive relief to the plaintiffs and the University is, therefore, not stayed from carrying out its duty to comply with State law.

Members of the academic staff holding term appointments may not be removed during such terms except upon notice of stated charges and an opportunity to be heard as provided in the Board's Policies. In the cases of Maud and

Hochfield you have had the discussions with them required by the Board's Policies when a matter which might be the subject of charges arises. They have confirmed their refusal to comply with the University's directions to furnish the so-called Feinberg certificate and you have recommended to the Acting Chief Administrative Officer prior to my taking up the duties of President, that charges be preferred against them for insubordination based thereon, but without suspension from their positions pending the determination of such charges. I can find no basis upon which I might excuse or waive their compliance with the generally applicable requirements of the University, and have, therefore, directed the University Counsel to prepare an appropriate statement of the charges to be served upon them.

[fol. 72] Such charges will entitle them to a hearing, if demanded, before a standing committee of their academic colleagues which will accord them due process within the University's own procedures. In such a hearing the basis of the charges must be substantiated and they will have full opportunity to meet them.

There is an additional consideration in the case of Garver. His objection to furnishing the required certificate seems to have been primarily a matter of religious belief based upon the custom of the religious tradition to which he belongs, the Religious Society of Friends. Mr. Garver's sincerity has not been questioned although effort was made to convince him that the certificate as to the fact of Communist Party membership did not constitute the "vain protestation" he claimed it to be. Because Mr. Garver sought time to evaluate his religious convictions and to submit the matter to the Friends' yearly meeting, he was allowed to teach in summer school and because he was not given notification that his term appointment would not be renewed, he was given a new term appointment for 1964-65. The Yearly Meeting affirmed that the interpretation of the

Friends' tradition was "a matter of individual decision" and Mr. Garver has since made known his decision not to sign the prescribed certificate. The situation seems to be that you have not yet discussed this ultimate refusal with Garver as a matter which might be the subject of charges and which should be done under the Board's Policies if such charges are to be considered by you. Counsel advises me that he can find no constitutional right to exemption from the Board's requirement on the ground asserted and the Board has provided for none. If after discussion you should make the same recommendation with respect to Garver as in the cases of Maud and Hochfield, the same course outlined above will be followed.

In all of the cases the issue which arises is not misrepresentation. Neither is there any present accusation of advocacy of violent overthrow of government. The three have taken a position that the requirement may not validly be imposed upon them and have sought a judicial determination of that issue. For that reason I am in accord that there need be no suspension while the issue is being determined. For the same reason they should not be deprived of normal increases and advancements which they would otherwise receive. I have, therefore, given instruction that these matters be determined by the same considerations that would obtain had they not broached the issue of the Feinberg [fol. 73] certificate. Because of State constitutional and statutory restrictions, no retroactive adjustment can be made, but they will now be prospectively considered and determined as quickly as possible.

It must finally be observed that none of the foregoing is intended to condone the refusal of the faculty members to comply with the University's requirements. It recognizes only that the extent of any presently contemplated charge against them is refusal to comply with a direction which they, in presumed good faith, claim cannot validly be imposed upon them. They must remain fully responsible for

their conduct in the light of the ultimate disposition of that claim and the duty of the University as it then appears.

Sincerely yours,

Samuel B. Gould
President

JCC:HK

cc: Mr. Murray
Mr. Price
Mr. Orentlicher,
A.A.U.P.

[fol. 74]

EXHIBIT "6" TO STIPULATION OF FACT

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 10741

GEORGE E. STARBUCK,

Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS,

Defendants.

Testimony taken in hearing before the HON. JOHN O. HENDERSON, United States District Court Judge, Western District of New York, on March 30, 31, 1964, at Buffalo, New York.

APPEARANCES:

RICHARD LIPSITZ, ESQ., 120 Delaware Ave., Buffalo, New York, Appearing on behalf of Plaintiff.

LOUIS J. LEFKOWITZ, ESQ., State Atty. Gen., By JOHN C. CRARY, ESQ., and MATTHEW TIFFANY, ESQ., State Office Bldg., Buffalo, New York.

[fol. 75] INDEX TO WITNESSES

Clifford C. Furnas
Harry W. Poppey
Thomas E. Connolly
Oscar A. Silverman
George E. Starbuck

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Plaintiff's:

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P- 8 Letter
P- 9 Letter
P-10 Document
P-11 Pamphlet
P-12 Document
P-13 Document

Defendant's:

D-1 Document

[fol. 76] The Court: I will hear your proof.

Mr. Lipsitz: Alright. Dr. Furnas, please.

Mr. Crary: May I enter an objection to the taking of any evidence on the grounds that the Court is without power to grant the injunction.

The Court: Yes.

CLIFFORD C. FURNAS, called as a witness on behalf of Plaintiff, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Lipsitz:

Q. Dr. Furnas, even though we all know you, will you state your name and position for the record?

A. I am Clifford C. Furnas, President of the State University of New York at Buffalo.

Q. How long have you occupied that position?

A. Since September 1, 1954; of course, with the predecessor institution of University of Buffalo.

Q. You occupied the equivalent position when it was the University of Buffalo?

A. Correct.

Q. What was that known as?

A. The Chancellorship.

[fol. 77] Q. When did you become the President of what we have been referring to in the pleadings as SUNYAB?

A. It would be September 1, 1962, when it became the State University.

Q. Now, were all of the properties and facilities that had at that time been owned and been operated by the University of Buffalo taken over by the State?

A. Essentially.

Q. Did that include the library?

A. Yes, sir.

Q. Now, at that time, at the time of the acquisition, there was a library at the then University of Buffalo, was there not?

A. Correct.

Q. Was the library in one place or was it over a number of locations?

A. A number of locations.

Q. What is that called; is that a division of the University?

A. It is called a division of the University, the Division of Libraries.

Q. The Division of Libraries. And at the time of the taking over in September, 1962, was there a person in charge of the Division of Libraries?

A. There was a Director.

[fol. 78] Q. Who was that?

A. Dr. Oscar Silverman.

Q. Did he remain in that position until the present time?

A. Yes, sir.

Q. Never been discharged or repudiated in his position?

A. No.

Q. Prior to the takeover, did he occupy any equivalent position at the University of Buffalo?

A. He did.

Q. And before that time he was also Chairman of the English Department?

A. He held that dual position for a substantial period of time.

Q. Has he relinquished or been—

A. He relinquished his duties of Chairman of the Department of English.

Q. Now, is the Director a position which you can acquaint to some other position at the University?

A. It is equivalent to a Deanship.

Q. Deanship?

A. Yes.

Q. The Deanship is a position in charge of what?

A. In charge of the school, or in some cases called a college.

Q. For instance, the Dean of the Law School is a Deanship?

[fol. 79] A. That is correct.

Q. And of the Arts and Sciences College?

A. That is a Deanship. The Director in this case is equivalent to a Deanship.

Q. Do you have a position known as Lecturer at what was then the University of Buffalo and now known as SUNYAB?

A. That is correct.

Q. What is the position of Lecturer?

A. Those are usually part-time positions, more often than not, in the English Division or Millard Fillmore College.

Q. Do Lecturers lecture in the day schools?

A. There are in some of the schools a title of Lecturer.

Q. Are those persons, that is the Lecturers, on the academic staff of those schools in which they lecture?

A. Yes, they are members of the academic staff.

Q. Now, Doctor, did there come a time in the early part of this year when a decision was made to discharge George Starbuck; are you aware of that?

A. Yes, there was.

Q. Did you become involved in that decision?

A. I did.

Q. Did you make that decision?

A. I did not.

[fol. 80] Q. Are you the Chief Officer of the State University at Buffalo?

A. Presumably.

Q. You are hired to be the Chief Officer, are you not?

A. Correct.

Q. Somebody, however, is in authority over you somewhere along the line?

A. That is correct.

Q. Who or what position is that?

A. That is the position, the official usually known as the Acting President of the State University. Actually, I think the official title is Acting Administrative Officer of the State University.

Q. There was a time until recently when there was a President of the State University who then resigned and that position became vacant?

A. Yes.

Q. The person in that position, or the Acting President, is your superior?

A. That is correct.

Q. His name is Mr. J. Lawrence Murray?

A. That is right.

Q. Was it he who directed you to discharge Mr. Starbuck?

A. That is correct.

Q. Pursuant to those directions, you submitted or sent [fol. 81] a letter to Mr. Starbuck?

A. That is correct.

Mr. Lipsitz: Your Honor, that letter—I am trying to avoid being formal at this point—is the letter of January 28, 1964, attached to our moving papers.

The Court: I remember that.

Mr. Lipsitz: I assume there is no dispute over that?

Mr. Crary: No, none.

By Mr. Lipsitz:

Q. Now, in connection with the decision to discharge him, did Mr. Murray send you a letter?

A. He did.

Q. And that letter is a letter dated December 31, 1963, of which I show you a copy, is it not? First look at it, please? Is that a copy of the letter?

A. That is a copy of the letter.

Mr. Lipsitz: That is attached to our moving papers as Exhibit 7.

By Mr. Lipsitz:

Q. Doctor, did you consult with anybody about whether or not Mr. Starbuck should have a hearing in connection with his prospective discharge?

[fol. 82] A. I did not.

Q. Accordingly, he was not given a hearing, is that correct?

A. That is correct.

Q. Now, you have a female employee by the name of Jeanette F. Martin?

A. Yes.

Q. What is her position?

A. Administrative Assistant.

Q. To whom?

A. Me.

Q. Do you have more than one Administrative Assistants or—

A. Not with that title.

Q. What are her duties?

A. She is in charge of the personnel in the office, with the exception of my personal secretary. There are five women who work for her. She is the one who keeps the—you might say the accounts of the office, the records of the office, and a number of miscellaneous duties. I think they are the principal duties, however.

Q. Does she sometimes communicate for you to the persons who represent the faculty in the Senate of the State University?

[fol. 83] A. Yes, she takes on a number of duties for me.

Q. Would you tell us what the Senate of the State University is, briefly?

A. I will ask you to clarify. If you mean the State University at Buffalo, I can tell you.

Q. Alright. There are two Senates?

A. There is a Senate of the State University system, as a whole.

Q. Then there is one at SUNYAB?

A. That is right.

Q. Does she perform duties—I will withdraw that. Are you involved in the Senate at SUNYAB?

A. I am chairman of it.

Q. You are the presiding officer?

A. Yes.

Q. It is in connection with that that she sometimes performs duties for you?

A. That is right.

Q. Now, just briefly describe what the Senate at SUNYAB consists of, what is its function?

A. The Senate at SUNYAB consists of 60 some members, ex-officio, or the deans of the instructional schools and of the divisions, and then there are—the remainder are elected by the faculty from the ranks of the faculty. Some of the members are specified from the particular [fol. 84] divisions or schools, and some elected at large from the faculty as a whole.

Q. Do they perform a governing kind of function?

A. They only advise.

Q. They advise in respect to policies of the faculty and the staff of the University?

A. That is right.

Q. Was this an institution which existed when it was the University of Buffalo?

A. That is correct.

Q. It has been carried over in substantially the same form after the merger?

A. That is correct.

Mr. Lipsitz: Would you mark this, please?

(Thereupon document referred to was marked Plaintiff's Exhibit P-1 for identification.)

By Mr. Litpsitz:

Q. I show you Exhibit P-1 marked for identification, consisting of five pages, and I ask you if you recognize that document?

A. I do not recall seeing this particular listing.

Q. Referring to the first page, which is in the form of [fol. 85] an unsigned memorandum to Dr. Thomas Connolly from Jeanette F. Martin, do you recollect seeing that before or knowing about it?

A. I haven't seen it or known about it.

Q. Is it Miss or Mrs. Martin?

A. She goes under the name of Miss Martin; she has a married name.

Q. Miss Martin did not discuss this with you?

A. She did not.

Q. Does she do these things within the authority of her job, however?

A. Yes, sir.

Mr. Lipsitz: I have no further questions of this witness.

Cross examination.

By Mr. Crary:

Q. Dr. Furnas, you participated in the negotiations which led up to the merger of the University of Buffalo into the State University of New York?

A. I did.

Q. Would you tell the Court whether or not there was discussion during the course of those negotiations as to the questions which would be presented by the University becoming a State institution with respect to compliance with the Civil Service Law?

[fol. 86] A. There was not. At the time that I was present at any of the discussions, those points were not touched upon.

Q. You knew when the University became a part of the State University of New York its employees would be subject to the Civil Service Law?

A. I did.

Q. You knew that in the legislation which was introduced in the Legislature and drafted to meet in part the problems of the merger there was a section which dealt with the compliance with the Civil Service Law?

A. I was not aware of that, no.

Mr. Crary: Your Honor, I am referring to Chapter 980 of the Laws of 1962 of the State of New York, which is a

matter of law, and if your Honor states that he is not familiar with it, I will put it before your Honor as a statutory enactment.

The Court: I will take judicial notice of the Civil Service Law of the State of New York.

Mr. Crary: This is a session law which dealt specially with the merger of the University.

[fol. 87] The Court: Do you have any objection if I have—receive that?

Mr. Lipsitz: Not at all. We are going to supply you with parts.

The Court: I will receive that.

By Mr. Crary:

Q. Doctor, did you have anything personally to do with the hiring of Mr. Starbuck?

A. No, I did not.

Q. Attached to the Plaintiff's moving papers is a copy of the letter of January 28, Exhibit 6 of the Plaintiff's moving papers; a letter of January 28th, purporting to be signed by you and addressed to Mr. George E. Starbuck, in which it is stated that you are enclosing a copy of the letter from J. Lawrence Murray; it deals with "your failure thus far satisfactorily to complete Block 7 of the application for nomination form as required by Civil Service." Do I understand from that—or may I ask you, did that indicate that you knew that the requirement to fill that question was one laid down by the Department of Civil Service?

A. At that time I knew it, yes.

[fol. 88] Mr. Crary: That is all, your Honor.

Mr. Lipsitz: No further questions.

The Court: That is all, Doctor.

You won't want to call Dr. Furnas, will you, again?

Mr. Lipsitz: Dr. Furnas, you are excused.

(Witness excused.)

HARRY W. POPPEY, called as a witness on behalf of the Plaintiff, and being first duly sworn, testified as follows:

Mr. Lipsitz: Before you are seated, did you bring a briefcase with you with many documents, and, if so, would you mind taking them up to the witness stand?

Direct examination.

By Mr. Lipsitz:

Q. What position do you occupy at SUNYAB?

A. I am Director of Personnel.

Q. How long have you held that position?

A. Three years in September.

Q. At this time then you were employed by the University of Buffalo before it was merged?

[fol. 89] A. A year prior to the merger.

Q. Did you occupy an equivalent position?

A. Same title.

Q. Director of Personnel?

A. Yes, sir.

Q. Would you describe the duties of Director of Personnel?

A. Basically, it is to aid, advise, assist the faculty and department heads in obtaining qualified people through Civil Service, and in transmitting faculty appointments and promotions through Albany, and advising officers and staff of their fringe benefits available through the State and through the private corporation of the University.

Q. You said that you advised the obtaining of personnel through Civil Service. You never recommend or involve yourself with people not covered by Civil Service?

A. We have two kinds of categories; covered by Civil Service and the faculty not covered by Civil Service. We also have a corps, which are non-State employees in the research foundation.

Q. You do involve yourself in giving advice and consult personnel not covered by civil service?

A. That is right.

[fol. 90] Q. Now then, are you familiar with the position held by George Starbuck?

A. Yes.

Q. You became familiar through the performance of your duties as Director of Personnel?

A. I transmitted his application to Albany.

Q. In pursuance of your duty as Director of Personnel?

A. Yes.

Q. In your subpoena you were asked to bring documents with you. In compliance with that subpoena, did you bring what you thought were the documents?

A. I have everything, I think, that it covered.

Mr. Lipsitz: May I have an opportunity to look at those? This is the first chance I have had.

The Court: Yes. Howvoluminous are they?

Mr. Lipsitz: Eight or ten letters, some forms, and his retirement application.

The Court: We will take a short recess.

(Thereupon a recess was taken at 12:45 p.m.)

(Proceedings resumed pursuant to recess, commencing at 1:00 p.m.)

[fol. 91] By Mr. Lipsitz:

Q. Mr. Poppey, before the recess I asked you to give me a folder, which you did. I ask you for that folder of documents pertaining to Mr. Starbuck. Thank you. Would you mark this for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit P-2 for identification.)

By Mr. Lipsitz:

Q. Mr. Poppey, I show you what has been marked P-2 for identification, and I ask you if that is one of the documents from your file?

A. Yes.

Q. Now, before I ask you questions about it in detail, tell me what this form is?

A. It is an internal appointment or change of status form at the University.

Q. Is this a form created by the University?

A. It was the same form in use as a private university, we have been using it as a carry-over.

Q. In connection with these forms, are they in multiple copies?

A. Six part carbon sets.

[fol. 92] Q. Referred to as the Pentagon?

A. Yes.

Q. Because of the six parts?

A. I don't know.

Q. Now then, is P-2, the form, the Pentagon form used in the original employment—I'm not going to characterize it beyond that—of Mr. Starbuck at the University?

A. Yes.

Mr. Lipsitz: I offer it in evidence.

The Court: Any objection?

Mr. Crary: May I ask a question in connection with the exhibit?

The Court: Yes.

Preliminary examination.

By Mr. Crary:

Q. You say this is an internal form?

A. Yes.

Q. This is used solely within the State University of New York at Buffalo?

A. Yes.

Q. This does not go to the Department of Civil Service?

A. No, this stays in the Department, in the Personnel Office, at the Dean's Office, and the Payroll Office.

Mr. Crary: I have no objection to it, for what it is [fol. 93] worth.

The Court: Received.

(Thereupon Plaintiff's Exhibit P-2, previously marked for identification, was received and marked in evidence.)

By Mr. Lipsitz:

Q. Do you recall a time before this document was completed that Dr. Silverman called you about hiring Mr. Starbuck?

A. Yes.

Q. Do you recall when it was or approximately when it was?

A. Within a week before he came. I believe somewhere in late September.

Q. And did he speak to you by telephone, Dr. Silverman?

A. It was either Dr. Silverman or Mr. Ernst, either one of them.

Q. Mr. Ernst is Dr. Silverman's assistant as Director of the Library?

A. That is right.

Q. In any event, one of them spoke with you?

A. That is right.

Q. And it is a fact that whoever spoke to you told you [fol. 94] that he proposed hiring Mr. Starbuck?

A. That is right.

Q. And asked you if you would clear it with Mr. Randall?

A. That is right.

Q. Who is Harvey Randall?

A. Harvey Randall is the Assistant Director of Personnel at the State University.

Q. He is employed at the State University offices in Albany?

A. That is correct.

Q. And did you—I am not asking for the conversation—did you subsequently take this up with Mr. Randall?

A. Over the telephone, yes.

Q. Did he advise you that the employment would be approved?

A. That is correct.

Q. Did you relay that information to Dr. Silverman or Mr. Ernst?

A. Yes.

Q. Following that then, in the number of copies that it was made out in, you received P-2, is that correct?

A. We received the whole set of that.

Q. One of which was the document known and received in evidence as P-2?

[fol. 95] A. That is right.

Q. Now, when you received this, Mr. Poppey, which part of it was filled out?

A. Everything that is typed in, except Dr. Silverman's handwriting on it and mine.

Q. Everything typed in was on it when you received it?

A. Yes.

Q. Except, I assume, for Dr. Silverman's own signature?

A. That is right.

Q. Now, there is some handwritten matters opposite Dr. Silverman's signature, which appears to read, "Apprvd. by Albany, Sept. 1963"?

A. That is right.

Q. Who placed that on there?

A. I did.

Q. Underneath Dr. Silverman's signature, opposite the printed legend, "Approved by", there appears some initials; whose initials are those?

A. My initials and Dr. Anderson's.

Q. Who is Dr. Anderson?

A. Vice President of the University.

Q. What is his particular duty?

A. Vice President for academic affairs, responsible for all appointments that come.

Q. Would you repeat that?

[fol. 96] A. He is Vice President for academic affairs, educational affairs.

Q. At the—

A. SUNYAB, yes.

Q. Did he occupy an equivalent position before the merger?

A. Yes.

Q. He continued to occupy it after that?

A. That is correct.

Q. Does he involve himself in the appointments and recruitment of personnel for SUNYAB?

A. In most cases, yes.

Q. When you say "in most cases;" what kind does he not?

A. The clerical level would be utilized from a list. Dr. Anderson—all Pentagons used to go through Dr. Anderson's office completely.

Q. Now those go through, except for clerical and charladies, janitors?

A. No, those that pertain to civil service and certain other areas are directed directly to my office. I sign for Dr. Anderson, though.

Q. But you sign for Dr. Anderson then, in terms—

A. Out of custom.

Q. Alright. Now then, after you received this form, or these forms, was something done to allow Mr. Starbuck [fol. 97] to begin to perform services?

A. He was called over to the office, I believe, by one of the girls to fill out the employment form. I think he filled them out October 2nd.

Q. And then he started to perform services?

A. I think he started October 10th.

Q. What was done to get him on the payroll?

A. That form was initialed up to the payroll office, along with his employment form, where they created the State Employment Forms.

Q. That form, meaning P-2, was sent in, one of its copies was sent to your payroll office?

A. That is right.

Q. That payroll office is located at SUNYAB?

A. That was the internal payroll office at SUNYAB.

Q. Do they do anything to send it to State for approval?

A. Transmit that information on to the State form, goes into Albany for approval.

Q. Is there a form in here which is the State form that went to Albany for approval?

A. PR 75, this one.

Q. Before we go into that; did you review this P-2 before you sent it on?

A. I signed it, yes.

Q. Did you read it?

[fol. 98] A. Yes.

Q. Did you take exception to anything on it?

A. Well, I just made the acquisition. I changed the acquisition to read N.S. after the title.

Q. What does N.S. mean?

A. Non-statutory, not in a grade.

Q. When you say it is not in a grade, you mean it hasn't been classified in any position by the Civil Service Commission?

A. No, it is just—N.S. means that it just hasn't been placed in any allocation grade. It can be either U grade or SG grade.

The Court: I don't get that, what is that about?

Mr. Lipsitz: I don't get it either.

The Witness: Let me give an example. A stenographer can be SG-4—

The Court: What does SG mean?

The Witness: It is a symbol meaning it is—SG stands for salary grade, and SG-4 means that is the salary they pay a stenographer, starting at a certain pay level, SG-4. The U grade has a comparable position, having U and another number after it. That might be used for assistant professor. The terminology N.S. means solely that it's [fol. 99] not against either grade. When you hire a part-time typist she would be N.S. If we hired a part-time lecturer, he would be N.S., meaning not statutory, no grade.

The Court: What is this, N.S.?

By Mr. Lipsitz:

Q. You placed the N.S. on here?

A. That is right.

Q. There is some other language on here which I don't understand, "P plus S"?

A. This is my notation to the payroll office, what to do with the position. This is to pay for temporary service pending the change in the budget segregation.

Q. What does that mean?

A. The budget segregation is the paying document issued by the Division of the Budget, sent to the Department of Audit and Control so they can pay employees from that portion of it. The position that they wanted to appoint Mr. Starbuck did not fit against this budget segregation. We are paying from a lump sum of temporary service money until the budget segregation could be changed.

[fol. 100] Q. It didn't fit because he was being paid at a different rate than the person whose job—previously had held that job?

A. I think in this case—I'm not sure—I don't think that line item existed on the State segregation at all.

Mr. Lipsitz: Would you mark this?

(Thereupon document referred to was marked Plaintiff's Exhibit P-3 for identification.)

The Court: Do I understand you have got a certain amount of money set up on a regular budget, then you get a lump sum to play with for temporary employees?

The Witness: No. In many cases, since the merger many of our employees didn't fit the normal State pattern of title and grade, so what we had to do, any time we hired anybody that didn't fit a normal pattern, or was a definite replacement at the same title and grade, we would have to [fol. 101] pay through temporary service until we could get the budget changed. We were utilizing a lump sum of money as temporary service for, in fact, most of the appointments that we have made at the University.

The Court: How did that come about, that title change; was that established through some regular routine, or how did it come about that a person who was being paid out of the lump sum finally would be transferred over to the regular budget?

The Witness: It is all the same amount of money, except some of it is lined out. And the best example, in the line item, either we can hire a person at that title and salary, or if we do not find a person we can employ at that salary, we must employ them through means of temporary service, getting them on the payroll, and getting the segregation in the budget changed the next time around.

The Court: You mean the next year?

[fol. 102] The Witness: The next quarter, every three months.

By Mr. Lipsitz:

Q. Was there a change in the next quarter?

A. I don't know. He had been moved to a line by this time. This is September—probably December or February.

Q. When he was moved to a line, you mean on the budget for the Division of Libraries there was a specific line allocated for this position and Mr. Starbuck was moved into it?

A. No. This again—the budget that you were referring to before is the internal budget where they ask for money in that portion. Again, when we ask the State for the money, we have to translate our internal budget into different terms. Even though Dr. Silverman had a sufficient amount of money against his line in his internal budget, that line didn't exist in the eyes of the State, it was not segregated out.

Q. That line does not exist for anybody in the eyes of the State, it is only in your internal budget, is that correct?

A. On the internal budget. Then it exists when we change the segregation.

[fol. 103] Q. We will come to the budget later. I show you P-3 marked for identification, entitled Payroll and Personnel Transaction Form PR 75, and I ask you if you can identify that?

A. That is the one prepared by Mr. Starbuck on the payroll.

Q. That is prepared by what personnel, where?

A. In our payroll office.

Q. At SUNYAB?

A. Yes.

Q. It is in turn, or one of the copies of it, is forwarded to Albany?

A. The whole package is forwarded to Albany.

Q. Do you get one back?

A. This is the one we get back.

Q. Now, this is filled out, you say, in your payroll office in Buffalo?

A. That is right.

Q. Is it reviewed by anybody?

A. It is reviewed by the Department of Civil Service, in the Department of Audit and Control.

Q. Is it reviewed by anybody at Buffalo before it goes there?

A. Only the payroll office.

Q. If they did their job they would have reviewed this [fol. 104] before it went out?

A. That is correct.

Q. What is this N.C. on here refer to at line 11?

A. There it refers to non-competitive. It's an error, that's why the line is through it by somebody in the Civil Service—

Q. Who is it an error by, you or somebody else?

A. If I do—

Q. Who placed it on there?

A. The payroll office.

Q. Who placed the line through it?

A. I would assume someone in the Civil Service, there is where it goes to first.

Q. You don't know who placed the line through it?

A. No.

Q. Do you have a document which consists of all the positions that are available to employ persons at SUNYAB?

A. Yes.

Q. From Dr. Furnas' job on down to the lowest janitor?

A. That is correct.

Q. And do those jobs—withdraw that. Is the job of an assistant in acquisitions in that document any place?

A. The internal roster of the—I'm sorry—I thought [fol. 105] you said do we have a listing of all the jobs at SUNYAB?

Q. Yes.

A. Yes.

Q. You say yes, and that is from Dr. Furnas on down to the janitor?

A. That is correct.

Q. And is the job of assistant in acquisitions on that?

A. Yes.

Q. Are those jobs placed in any categories on that collection of job titles?

A. Those that were there—the people are placed in the—

Q. I'm not asking about the people.

A. The positions are not placed in any category.

Q. In other words, the position of—do you have the position of stenographer?

A. Yes.

Q. Do you fill that position from time to time?

A. Yes.

Q. Is that not categorized?

A. That one is.

Q. As what?

A. As stenographer, competitive class.

Q. Is that the only one?

[fol. 106] A. There are a number of others they have classified.

Q. How many positions on that list that you maintain at SUNYAB, not persons, but positions?

A. Different positions? Roughly, I would say literally between five hundred and one thousand different positions.

Q. What percentage of them are classified on that document as to being whether or not they are competitive?

A. Whether or not they are competitive?

Q. Yes.

A. As far as competitive, all except the faculty are competitive.

Q. Is an assistant in acquisitions listed as a competitive job?

A. It is competitive because it is not in the classified.

Q. Is it listed as a competitive job as a stenographer is listed?

A. No. Again, I have to clarify. Because we don't have an asterisk over the job saying this job is competitive, this is not competitive. We have a listing of positions and we have a status and a classification of the individuals in those jobs.

Q. In other words, the fact there is an absence of an asterisk leads you to conclude that therefore an assistant [fol. 107] in acquisitions is a competitive job?

A. No, it's a—the assistant in acquisitions hasn't been placed on the classified service.

Q. What has it been placed in?

A. By not being placed—it hasn't been placed yet.

Q. It hasn't been placed yet, and by not having been placed yet it belongs someplace?

A. That is what the law says.

Q. That is what you are saying?

A. All positions not in the unclassified service or listed in the—all positions that are not in the classified service or that haven't been listed out by the Department of Civil Service as being in the exempt or non-competitive class are automatically in the competitive class.

Q. What examination has been created for this job of assistant in acquisitions?

A. So far, none.

Q. Aren't examinations created for competitive jobs whether written or verbal?

A. Even the application can be an examination process in and of itself.

Q. There has been no examination for this job?

A. That is correct.

Q. Now, I call your attention to Line 14 on P-3—

[fol. 108] A. That is right.

Q. Where there is an X under the legend, duration in the box marked permanent?

A. That is correct.

Q. That hasn't been crossed off?

A. That is right.

Mr. Crary: If the Court please, counsel is examining on a document which he has marked for identification. He is now examining from it, it is not offered in evidence.

The Court: Do you want to offer it?

Mr. Lipsitz: I intend to—

The Court: Offer it now.

Mr. Crary: I object to the document he is offering on the grounds that it is incomplete. When this was sent to civil service, as Mr. Poppey testified, there was a back page on the form which was sent to civil service. That is this famous PR 75 form. I would suggest if it were offered we offer the whole document.

The Court: I assume you have in mind that there is another form which has the Question 7 which we are here [fol. 109] about?

Mr. Lipsitz: There is no doubt about there being another form. I am not offering that. I am offering this from this witness' records.

The Court: Is that all you have; don't you have the second sheet to that form?

The Witness: The back sheet of the form, the application on the back of the original form, that goes to the Department of Civil Service and stays there.

The Court: This is something from your regular files?

The Witness: A carbon copy.

The Court: Used in the course of the University's business?

The Witness: That is a carbon copy of—

Mr. Crary: I'll concee this is the form which was returned to the Universit of Buffalo from Civil Service, but I object to it being introduced as being the complete document which went to Civil Service.

The Court: Alright. Obviously it isn't offered as such. There is another page to it that goes forward from the [fol. 110] University.

Mr. Lipsitz: Apparently there is. I am only offering this page.

The Court: Overruled received. Mark it now.

(Thereupon Plaintiff's Exhibit P-3, previously marked for identification, was received and marked in evidence.)

By Mr. Lipsitz:

Q. You are familiar with the Civil Service Law, at least insofar as it has become necessary to perform your duties?

A. Yes.

Q. There are some notations here opposite Item 20 on this exhibit, P-3 in evidence, which are a little bit vague because of the lightness of the writing. Would you tell us, however, what the second line reads at Item 20 that is written in hand?

A. It is Rule 64-3, pending classification and compensation action.

Q. Who filled that in?

A. Department of Civil Service Transaction. The Department of Civil Service Transaction Unit.

[fol. 111] The Court: Excuse me, I heard compensation, what was the other?

The Witness: Classification and compensation.

By Mr. Lipsitz:

Q. In other words, it is pending 64-3 offered, meaning that is the authority pending classification and compensation action?

A. That is right.

Q. That was presumably filled in here by somebody in Albany after you sent the forms in and before it was returned?

A. That is correct.

Q. Is Dr. Simmons a person working in the Civil Service?

A. Yes.

Q. In Albany?

A. Yes.

The Court: What is 64-3?

The Witness: 64-3 is the section of law, the rule whereby we can appoint people temporarily pending certain kinds of action.

Mr. Lipsitz: I was coming to that, your Honor.

By Mr. Lipsitz:

[fol. 112] Q. In connection with 64-3, that is a provision of the Civil Service Law, isn't it?

A. That is correct.

Q. Did you use that in making appointments before?

A. Yes.

Q. Did you recommend that be the authority when this form went into Albany?

A. This is the authority that they have used for all temporary appointments—not all, most temporary appointments, pending some future—later, future action.

Q. Did you recommend the use of this as the authority?

A. No.

Q. In other words, you didn't have any discussion with Dr. Silverman or Mr. Ernst about whether or not this job would be "on an occasional basis"?

A. No.

Q. This job wasn't on an occasional basis?

A. No.

Q. And you didn't have any conversation with Mr. Ernst or Dr. Silverman as to whether or not "this job was on a full-time or regular part-time basis and a temporary position established to conduct a special study for a period not exceeding eighteen months"?

A. No.

[fol. 113] Q. It is not that kind of job, is it?

A. No.

Q. How many assistants in acquisition are employed by the library at SUNYAB?

A. I don't know the exact number. There is about 30 to 40.

Q. For how many of them have there been competitive examinations?

A. One.

Q. If any?

A. One.

Q. One person?

A. One.

Q. What job was that?

A. Assistant Librarian, SG-14.

Q. When was that examination conducted?

A. I think it was held last fall.

Q. That is not Mr. Starbuck's position?

A. No.

Q. In other words, one out of the whole library department has taken a competitive examination, is that right?

A. Professional librarian, I think it's only one.

Q. How many are on the staff?

A. I think there is thirty, thirty-five professional [fol. 114] librarians.

Q. Let me ask you this, Mr. Poppey; have any of the people who were employed in the library before the merger been asked to fill out the question and answer the form that is known as Question 7 on the rear side of PR 75?

A. Only if they have changed jobs.

Q. If they remain in the same job as employed on before the merger, they haven't been asked to answer that question?

A. Not yet.

Q. Do you have anything to do with the conducting of hearings for personnel who are to be discharged or dismissed or punished by the University?

A. If Dr. Furnas would be responsible for having the hearing, he might have me as a hearing officer.

Q. Are you aware of any procedures that have been developed for that purpose?

A. There is a formal—there are procedures developed for that purpose, yes.

Q. Are they in writing?

A. There is a manual, yes.

Q. The manual is the Board of Trustee's Rules of 1962?

A. That is for the faculty, there is that procdure, and there is a Civil Service grievance procedure.

[fol. 115] Q. Did you bring that?

A. I'm sorry, I did not.

Q. May I see P-2? You say there is a procedure in it for the faculty; that is located where?

A. The faculty procedure is in the Board of Trustee's booklet. I do not have a copy with me.

Mr. Lipsitz: I do. Will you mark this as Plaintiff's Exhibit P-4.

(Thereupon booklet referred to was marked Plaintiff's Exhibit P-4 for identification.)

By Mr. Lipsitz:

Q. I show you Plaintiff's Exhibit P-4, and ask you if that is the policy of the Board of Trustees, 1962, and contains a procedure for faculty hearings?

A. It does.

Q. That is the one you just referred to?

A. One of them.

Q. Is this the booklet, the form in which it has been published, the one I am explaining to you?

A. Yes.

Mr. Lipsitz: No objection?

Mr. Crary: No objection.

[fol. 116] Mr. Lipsitz: I offer it in evidence.

The Court: Received.

Mr. Lipsitz: Except for the name on the upper left-hand corner.

(Thereupon Plaintiff's Exhibit P-4, previously marked for identification, was received and marked in evidence.)

By Mr. Lipsitz:

Q. Mr. Poppey, do you know who—is it Mr. or Dr. Price?

A. I'm sorry, I didn't hear the name.

Q. David S. Price?

A. Yes.

Q. Who is he?

A. Dr. Price is Director of Personnel now, his title is Assistant Vice President.

Q. Is he, in the chain of command, the person whose duties would be over yours eventually, up at the top someplace?

A. He is Director of Personnel for all University personnel, and Assistant Vice President.

Q. So your work is in line with his overall supervision?

A. Yes.

[fol. 117] Mr. Lipsitz: Would you mark this as Plaintiff's Exhibit P-5?

(Thereupon letter referred to was marked Plaintiff's Exhibit P-5 for identification.)

By Mr. Lipsitz:

Q. I show you Plaintiff's Exhibit P-5 for identification, a copy of a letter dated January 24, 1964, addressed to

Faculty Senators and Chief Administrative Officers; Reference, Grievance Procedures, Academic Employees; signed David S. Price; and I ask if you can identify that document?

A. Yes, I have seen it.

Q. Do you have a copy of it in your own records?

A. I hope so. I think so, yes.

Q. You have previously received a copy of the same document?

A. Yes.

Mr. Lipsitz: I offer that in evidence.

Mr. Crary: If the Court please, I have not objected to the introduction of the policies of the Board of Trustees, because they are the policies of the Board of Trustees and [fol. 118] they are applicable in accordance with their terms. Counsel is now introducing a letter from David S. Price, speaking of grievance procedures for academic employees, and to this I must object. There has been nothing established here which shows that the Plaintiff in this case is an academic employee with respect to his position.

The Court: Overruled; received.

(Thereupon Plaintiff's Exhibit P-5, previously marked for identification, was received and marked in evidence.)

The Court: I do not mean to imply be receiving it that it has or has not been established. Let me ask you, Mr. Poppey, up in the upper right-hand corner of this form, payroll personnel transaction form PR 75, there is a group marked one; what does that mean?

The Witness: One means those are all of the forms [fol. 119] that have to go to the Department of Civil Service reporting original appointments or promotions.

The Court: Let me ask you this; down at the left hand corner there is a comment, apparently, by a man named D. Simmons, "Certificate valid until 4/1/64;" what does this mean; is this a pay certificate?

The Witness: No, the Department of Civil Service has given approval to this appointment only until April 1, 1964, Rule 64-3.

The Court: It means they will pay them until then?

The Witness: Yes.

The Court: It is a payroll and personnel transaction, that means they will pay them up until then?

The Witness: Until April 1st, that is correct.

The Court: At the time they make that approval, that second sheet, including Question 7, is forwarded, is that right?

The Witness: That is part of the original document when it goes there, that is correct.

The Court: Question 7, you know what I am talking [fol. 120] about, that is all forwarded?

The Witness: Yes.

The Court: This fellow Simmons, if it is a man, puts down the approval for pay purposes at least until April 1, 1964?

The Witness: That is correct.

The Court: They send back a copy to you, you are authorized to pay?

The Witness: That is the authorization to pay. A copy of that goes to the Department of Audit and Control who simultaneously with the form starts printing the check in Albany, and when we get a copy back, when it's an order as such, it is our certification to know when it is approved until. It notices the Comptroller's Office their approval to release the checks.

The Court: Alright.

Mr. Lipsitz: By the way, your Honor, I would call your attention to the fact that P-2 has in the upper right-hand corner, under the direction "Check One", the box checked for faculty, just in connection with this P-5 that I offered.

[fol. 121] (Thereupon Plaintiff's Exhibit P-5, previously marked for identification, was received and marked in evidence.)

By Mr. Lipsitz:

Q. Now, Mr. Poppey, in connection with the certification on there of 4/1/64, did Mr. Starbuck become informed by you or anybody at your direction, at any time, that he was to be paid only until 4/1/64?

A. No.

Q. Did you tell Dr. Silverman or Mr. Ernst about that?

A. No.

Q. You have been the man in charge of personnel since—withdraw that. Dr. Silverman was Director of Libraries?

A. Yes.

Q. Could you tell me how many people he recommended for employment who have been employed since he has been Director?

A. I think they have hired an additional—about thirteen or fourteen professional librarians in the past year or so, two years, I would say.

Q. Without regard to whether they are professional [fol. 122] librarians or not; could you tell me the number of people he has recommended for employment in the library since this became State?

A. Every one of them.

Q. Would it surprise you to know the employment jumped from forty-odd to ninety-odd?

A. That is the total library.

Q. I didn't confine my question to the professional library people. Are my figures accurate?

A. About ninety in the library.

Q. From around forty at the time of the merger?

A. Yes.

Q. And has he recommended the employment of all; has he or Mr. Ernst recommended the employment of all those people?

A. In the categories that are clerical, he makes the commitment on who is hired.

Q. As Director, he was the one who filled out the Pentagon form?

A. Yes.

Q. Is the form he used for George Starbuck, which is received in evidence as P-2, a form similar to the others that he used for the employment of other people?

A. The same.

[fol. 123] Q. Has any one of his appointments ever been repudiated?

A. Not to my knowledge.

Q. Have any of the people ever been removed from the payroll?

A. No.

Q. Have you ever had any occasion to speak to Dr. Silverman or talk to him about a lack of authority in hiring people, or the limit of his authority?

A. Dr. Silverman has received a faculty appointment procedure memorandum. We have sent out memos on how to hire people.

Q. Has he been hiring according to those memos?

A. Yes.

Q. You never had occasion to call his attention to any deviation on his part on the hiring procedures at SUNYAB?

A. Not to my knowledge.

Q. You would be the fellow who would know about it?

A. Yes.

Q. Now, are there some positions at SUNYAB paid on a ten-month basis, some on a twelve-month basis?

A. Yes.

Q. Mr. Starbuck was to be paid on a twelve-month basis?

A. He was being paid on an annual salary.

Q. Meaning what?

[fol. 124] A. Every two weeks.

Q. Every two weeks?

A. Every two weeks.

Q. Throughout the year of his—

A. That is right.

Q. During the time of his employment period. The ten month people are paid monthly?

A. They are paid every two weeks over twenty-one bi-weekly pay periods, which is roughly ten months.

Q. Now, you heard Dr. Furnas testify, I believe, as to what a lecturer is?

A. That is correct.

Q. Did there come a time when Mr. Starbuck was offered employment as a lecturer?

A. Yes, we received a copy of his appointment as a lecturer.

Mr. Lipsitz: Would you mark this as Plaintiff's Exhibit P-6?

(Thereupon document referred to was marked Plaintiff's Exhibit P-6 for identification.)

Mr. Lipsitz: And would you mark this as P-7?

(Thereupon document referred to was marked Plaintiff's [fol. 125] Exhibit P-7 for identification.)

By Mr. Lipsitz:

Q. I show you Plaintiff's Exhibit P-6 marked for identification and P-7 marked for identification, and I ask you if you can identify those documents and, if so, by reference to the other ones already in the record?

A. Yes. These are from our records, yes.

Q. P-6 is a so-called Pentagon form?

A. That is correct.

Q. For his appointment to lecturer in English?

A. That is correct.

Q. And I note that the term of appointment is checked as part-time?

A. That is correct.

Q. And who is Ertell?

A. Dr. Ertell is the Assistant Vice President of Educational Affairs.

Q. He approved this?

A. That is correct.

Q. Your initials and notations do not appear here?

A. Just over to the left.

Q. H. P.?

[fol. 126] A. That is right.

Q. And P-7 is a similar document in content and form to the one previously offered in connection with Mr. Starbuck's employment as an assistant in acquisition; this one being as a lecturer in Millard Fillmore?

A. That was to pay him his additional salary as a lecturer over his normal salary.

Q. Judge Henderson asked you what this group number is; you have group two x'd.

A. Group two in this case, he already has an appointment before, it is not an original appointment. He already has an original appointment. I think group two in this case was to change his line item number, that is because we were moving from temporary service up to one of the existing line.

Q. Was this sent to Albany for approval?

A. That one, because it was paying for Millard Fillmore payment, which is our night service, we didn't need that kind of approval.

Q. Is Millard Fillmore not owned by the State of New York?

A. It doesn't need the approval by the Department of Civil Service where they are employed on the faculty. The faculty appointments do not go before the Department of [fol. 127] Civil Service.

Q. In other words, as a lecturer, he was on the faculty?

A. That is correct.

Q. Even though P-2, which was processed in the ordinary form, indicates he is on the faculty, that eventually did end up in the document going to Albany?

A. That is correct.

Mr. Lipsitz: I offer P-6 and P-7 in evidence.

Mr. Crary: I object to them because they deal with the position of lecturer, which is not in issue in this case at all.

The Court: Overruled; received.

(Thereupon Plaintiff's Exhibits P-6 and P-7, previously marked for identification, were received and marked in evidence.)

Mr. Lipsitz: Would you mark these as P-8 and P-9, these two documents?

(Thereupon documents referred to were marked Plaintiff's Exhibits P-8 and P-9 for identification.)

[fol. 128] The Court: Let me ask you, Mr. Poppey, did you see Mr. Starbuck's form, payroll and personnel transaction PR 75 at any time?

The Witness: No, not at its initiation.

The Court: Did you ever become acquainted with Question 7?

The Witness: Yes.

The Court: As far as he was concerned, in which he said, "I prefer not to answer, at least until the necessity and relevancy of this question is properly explained to me. G. S."?

The Witness: George was over to the office, we talked about it.

The Court: When did it come to your attention?

The Witness: Seriously, when it first happened, I thought it was a clerical error. Many times an employee will forget to fill out part of a form. One time when I was on the phone with Albany they mentioned they had a call from Civil Service, Mr. Starbuck didn't fill out the form. I think it was Harvey mentioned to me to send his form over. I had a [fol. 129] girl call the library to have him fill out another PR 75. It was at the time when George called back saying he was aware he did not sign that form and—

The Court: When was that?

The Witness: This was—

The Court: With reference to October, when he became worried?

The Witness: He originally filled out his PR 75 form on October 2nd, and I think George was in the office probably

some time late October or early November, that George was over to the office.

The Court: Now, Simmons approved this thing on December 6th, 1963; whoever Simmons is, do you know that?

The Witness: December? It is November.

The Court: November 6th.

The Witness: This is sent in to Albany. That was to pay him probably on November 6th at that time for the two pay periods. We have a closing deadline date internally within the office, as far as sending this into Albany. The payroll [fol. 130] office has to cut off the payroll period before. They send these to Albany about three weeks before payday to get approval of the check.

The Court: What I am talking about; you knew about Starbuck's failure to sign Question 7 at a date earlier than Simmons made this approval?

The Witness: It was probably around the same time, because it was by a phone call, and that he did not approve it. It was probably right about the exact same time that the phone call came down.

The Court: Well, was there ever any action to stop his pay as a temporary employee, or whatever you think he was?

The Witness: On the part of the University?

The Court: Because of his failure to answer Question 7?

The Witness: No. Again, we originally thought it was a clerical error.

The Court: You knew pretty soon it wasn't, Starbuck told you it wasn't, didn't he? When did he tell you it wasn't [fol.131] an error?

The Witness: When he was in the office.

The Court: When was that?

The Witness: Probably early November.

The Court: Alright.

By Mr. Lipsitz:

Q. As a matter of fact, you spoke to him about that in the last week in October and then again in November?

A. I don't know the exact date. I talked to George a couple of times, yes.

Q. I now show you what has been marked for identification as P-8 and P-9; would you tell us if those came from your files on Mr. Starbuck?

A. They are.

Q. P-8, consisting of a letter from you to Dr. Price, requesting the appointment of Mr. Starbuck, is that correct?

A. That is correct.

Q. Dated September 24, 1963?

A. That is correct.

Q. And his answer contained in the letter of October 2, 1963, to you?

[fol. 132] A. That is correct.

Mr. Lipsitz: I offer these in evidence.

Mr. Crary: No objection.

(Thereupon Plaintiff's Exhibits P-8 and P-9, previously marked for identification, were received and marked in evidence.)

By Mr. Lipsitz:

Q. Mr. Poppey, regarding the contents of P-8, did you ever take this up—the contents of this letter up with Dr. Silverman or was this a letter you wrote pursuant to his telephone request for authority?

A. I think this was from Dr. Silverman, his kind of information that I just included in my body of my letter.

Q. In other words, P-8 was the letter that you wrote to Dr. Price pursuant to Dr. Silverman's request of you to get authority before he filled out the Pentagon form recommending George Starbuck's hiring?

A. That is correct.

Q. As a matter of fact, the Pentagon form was not filled [fol. 133] out until you got the answer back from Mr. Randall on October 2, 1963?

A. I don't know, I would have to look at the date of the Pentagon. Sometimes they send the Pentagon over with-

holding approval. If Dr. Silverman's signature is there on the earlier date, it was already in my office then.

Q. It was filled out beforehand waiting for this approval?

A. That is correct.

Q. Did you ever communicate wtih Dr. Silverman and show him or read to him the contents of P-9?

A. We probably sent a carbon copy of that letter over.

Q. I didn't ask you what you probably did.

A. I don't know. Normally, when we get an official approval back from the central office we send a copy, a photocopy, over. In this case, I don't know whether we did.

Q. You didn't personally communicate the contents of P-9 to Dr. Silverman?

A. No.

Q. You don't personally know whether a copy was sent to him?

A. No.

Q. Referring to P-9, there is a reference to appointing [fol. 134] Mr. Starbuck "as assistant librarian II, U-5, in unallocated temporary service;" would you translate that for us?

A. That's the title and grade as a librarian.

Q. And "in unallocated temporary service"?

A. This is the—

Q. The line item?

A. The lump sum of temporary service money.

Q. What you referred to before as an appropriation of money?

A. That is correct.

Q. He goes on to say, "if you prefer to place Mr. Starbuck in Item 14391, you should amend your certificate of approval to reflect the additional salary required." What is he referring to there?

A. That is the budget certificate of approval. That didn't have sufficient monies in it to pay Mr. Starbuck.

Q. The salary that he was going to be paid?

A. That is correct.

Q. You did not amend the certificate, is that right?

A. The last notice, it was amended in December.

Q. In December, when the quarter, the new quarter budget report came out?

A. That is correct.

[fol. 135] Q. And he was then placed within an item of allocated funds on the budget?

A. That is right.

Q. Do you have anything to do with the budget affairs?

A. Somewhat; affairs, titles and salaries.

Q. Well, let me be more specific. Do any of the budgets for any of the departments or divisions come across your desk for approval or action?

A. Not for approval. They will come for aid, advice and assistance, insofar as increments, titles and things of that nature, annual increases.

Q. Did there come a time in 1964, in the early months, when the budget from the Division of Libraries came across your desk for advice concerning any of the personnel, more particularly Mr. Starbuck?

A. At that time I wouldn't have been aware of it. I wouldn't have been concerned with it.

Q. Have you since seen the budget for the Division of Libraries?

A. Yes.

Q. Has that been approved by the fiscal officers at the University, SUNYAB?

A. Internally, yes.

Q. Has it since been sent on for processing to Albany?

A. That document, no. What they do, there are calcula-

[fol. 136] tions to find out how much money they need in the library in their own manner, in their own language. Our budget office translates that in State terminology, as far as the money they need.

Q. Has the budget office translated into State terminology the 1964-65 fiscal budget?

A. Yes.

Q. It is awaiting approval, is that it?

A. It has been approved by the Legislature.

Q. The Legislature has approved it?

A. That is correct.

Q. Mr. Poppey, I show you a document consisting of nine pages, all of which are entitled "State University of New York at Buffalo Budget Proposal for Fiscal Year 1964-1965, Division University Libraries." I ask you if you have seen that or had that across your desk?

A. I have seen this. I have seen copies of that.

Q. Have you had occasion as Director of Personnel to examine any of the items on there?

A. Not in detail, no.

Q. Is this the document that you referred to as the internal budget, which is translated by SUNYAB's fiscal office and sent on?

A. That is right.

[fol. 137] Q. It is the quantity of monies needed to perform the jobs and services on this internal budget that has been translated in some form for the State?

A. The totals, yes.

Q. That has been approved by the Legislature?

A. We have received a total amount of money from the Legislature.

Q. Is it the practice then to allocate the monies in accordance with the internal budget that has been adopted at the State University?

A. Yes.

Mr. Lipsitz: May I have this marked as Plaintiff's Exhibit 10 for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit P-10 for identification.)

Mr. Lipsitz: May the record show that what I have been referring to is P-10.

The Court: Yes.

Mr. Lipsitz: I have no further questions.

The Court: Do you have any questions, Mr. Crary?

[fol. 138] Cross examination.

By Mr. Crary:

Q. Mr. Poppey, when the Legislature appropriates a lump sum of money without showing position by line and items, who segregates those amounts and makes them available for expenditure?

A. The Division of the Budget.

Q. Not the State University?

A. No.

Q. The State University does, however, make requests to the Director of the Budget?

A. Yes.

Q. The Director of the Budget actually segregates?

A. Yes.

Q. Now, even if there were money available for a position by title, money has been made available, segregated by the Director of the Budget, would you fill that position and pay an individual out of that item without the approval of the Civil Service Commission?

A. No, sir. The Civil Service Department would have to approve the appointment.

Q. Are you familiar with Rule 3.2 of the Rules of the Department of Audit and Control relating to the certification of the employment of persons in their positions as being lawful by the Civil Service Commission?

[fol. 139] A. Not specifically. If this is the—they must wait until the Civil Service approves it, then they release the check.

Mr. Crary: I would ask the Court to take judicial notice of a filed rule of the Comptroller of the State of New York. This is filed with the Secretary of State. It is published in the official compilation of rules and regulations of the State Department. I have the page from that publication which I would ask your Honor to take judicial notice of.

The Court: Any objection to that?

Mr. Lipsitz: No, sir.

The Court: Alright, I would like to have that left with me. I will take judicial notice of it. Make it Court Exhibit 1.

(Thereupon document referred to was marked Court Exhibit No. 1.)

Mr. Crary: I would like to read the very short first [fol. 140] sentence of that rule:

"The payment of salary or compensation to any person holding a position in the classified service is unlawful unless such person is certified by the State Civil Service Commission as lawfully employed in his position."

By Mr. Crary:

Q. Now, Mr. Poppey, in the policies of the Board of Trustees, which have been introduced in evidence by the Plaintiff, appears a section entitled, "Terminations of service" in which it says, "That the services of members of the academic staff may be terminated at any time for cause," and in the definitions contained in that statement of policies by the Board is a definition of academic staff, which says that, "It is comprised of those persons having full academic rank or qualified academic rank," full academic rank is defined as those holding the title of professor, institute professor, associate professor, institute associate professor, assistant professor, institute assistant professor, instructor, institute instructor, assistant instructor, and institute [fol. 141] assistant instructor. Did Mr. Starbuck, at any time during his employment by the State University of New York at Buffalo, have any one of those titles, to your knowledge?

A. No, sir.

Mr. Crary: Now, may I see the exhibits, please?

By Mr. Crary:

Q. Mr. Poppey, this exhibit, which I believe is P-2, you testified that this was internal in the sense it stayed at the University here at Buffalo?

A. That is correct.

Q. This did not go to Albany?

A. No.

Q. Had nothing further than that document been executed in this matter, would Mr. Starbuck have been added to the payroll?

A. No.

Q. And is this PR Form 75 the further action which was necessary to put him on the payroll?

A. That is necessary to get anybody paid, yes, sir.

Q. Now, there has been introduced in evidence as Exhibit P-3 a copy of form PR 75, bearing the notation on the face of it by the Civil Service Department, and signed by D. Simmons. Is this the whole of the document which was [fol. 142] sent to the Civil Service Department in Albany?

A. No, it is a five or six part stamp-out carbon. I know three copies go to the Civil Service, one or two go to Audit and Control, we retain one.

Q. Can you describe for us what else was on this document as it was sent to Civil Service in Albany?

A. Copy one has on the reverse side of it the application for nomination.

Q. And is that the thing which was signed by Mr. Starbuck?

A. Yes.

Q. And on which appeared Question 7 upon which he noted that he preferred not to answer?

A. Yes.

Q. Do you know where the original of that document now is?

A. It is in the Department of Civil Service.

Q. You do not have it?

A. No.

Mr. Crary: Your Honor, I have a photostatic copy of the document furnished to us by the Department of Civil Service at our request. If counsel has no objection, I would like to introduce it.

[fol. 143] Mr. Lipsitz: It is already attached to Mr. Randall's affidavit.

Mr. Crary: In place of the original.

The Court: We will receive it then.

(Thereupon document referred to was received in evidence and marked Defendant's Exhibit D-1.)

By Mr. Crary:

Q. Did you initiate the preparation of this document?

A. No. The front side is initiated by the payroll office.

Q. Do you know who put the X in the box stating permanent?

A. The payroll office.

Q. Fourteen?

A. The payroll office.

Q. In Buffalo?

A. In Buffalo, yes.

Q. That was put on before it was sent to Civil Service?

A. That is correct.

Q. Now, do you understand the meaning of the words written in ink on this document, "Pending investigation" [fol. 144] in Item 20?

A. Yes.

Q. Do you know who placed those there?

A. The Department of Civil Service.

Q. Can you explain to us what those words mean?

A. The back of the form was not completed and to not delay the payroll, they automatically check these disapproved or approved in this manner so that the payroll can get processed. This means there is some investigation, the investigation unit has to check further on the basis of some information on the reverse side.

Q. Did there come a time when the question of the incompleteness of the application was taken up with you by anybody?

A. Yes. Verbally by Harvey Randall. I received a written communique from the Civil Service through Harvey Randall stating that George Starbuck should complete the back of the form, and explained the requirement.

Q. When did this take place, if you recall?

A. This was going into November or December at this stage.

Q. Was this your first knowledge that the question had not been answered?

[fol. 145] A. No, it was early in October or November when Harvey called me, that the form was not completed. We had started at that time to have him complete the form.

Q. Did you have some conversation with Mr. Starbuck at this time about the question?

A. Yes.

Q. What was the nature of that conversation?

A. I explained the requirements, that all the employees in the classified service had to complete that, that it is a requirement of State law, much the same as the questions on age, height, education, previous mental illness or criminal records. This was one of their questions, it was in the law, and all applicants, if they don't come from a list by a written examination, are asked this on this form.

Q. Have all persons at the University of Buffalo, when in classified service, that is, not in the faculty, unclassified category, who have been employed anew since the merger, been required to fill out this kind of a form and answer that question?

A. Yes.

Q. Have they done so?

A. All of them have.

Q. Is this form, PR 75, the form which would be used to make an appointment in the unclassified service?

[fol. 146] A. No, it is 75 B; something similar, it isn't that form.

Q. It's a different form?
A. Yes.

Mr. Crary: If the Court please, I think those are all the questions I have of this witness.

Redirect examination.

By Mr. Lipsitz:

Q. When was the position that Mr. Starbuck was hired to be placed in in the classified Civil Service?
A. It has all the time been in the classified service.
Q. You say so, is that right?
A. I think the law says so.
Q. You think the law says so. What action has been taken in the form of any documents sent to you indicating that position has been placed in the classified Civil Service of any kind?
A. None.
Q. You said that he could not be paid unless this form, PR 75, were filled out and certificated, is that correct?
A. That is right.
Q. Is there a similar method of arranging for the payment of persons in the unclassified service?
[fol. 147] A. There is.
Q. But it is on a different form?
A. That is correct.
Q. It does not contain on the reverse side the question, that is, Question No. 7?
A. It does not.
Q. Let me ask you this, Mr. Poppey, you said that you called Mr. Starbuck and you explained to him that this is a question like the one on the certificate for the faculty people; is that what you said to him?
A. No.
Q. I don't want to misquote; what did you say to him about that?

A. I said that the faculty people sign a Feinberg Certificate, the non-faculty sign this application for nomination.

Q. Well, do you know whether or not Mr. Starbuck was told that he was a faculty employee?

A. Whether—

Q. Told by anybody?

A. He was probably told. The old terminology was rank without tenure or status.

Q. It is a fact that when the Pentagon was filled out it had marked with a check faculty?

[fol. 148] A. Yes.

Q. He believed he was a faculty person?

A. He never received that form.

Q. He discussed his hiring with Dr. Silverman when he was hired, did he not? When he was hired by Dr. Silverman he had discussion about his status?

A. Yes.

Q. I'm not asking what the discussion was. He certainly had discussions?

A. Yes.

Q. Did you explain the difference in the certificate and the answer to Question 7?

A. When George—yes, we talked about Question 7.

Q. Did you explain, did you show him a copy of the certificate that you referred to?

A. Yes, he had a copy of the certificate.

Q. Did you discuss the differences?

A. I think we talked about both.

Q. The differences are rather significant?

A. Two different forms.

Q. The question they ask is completely different?

A. Yes.

Mr. Lipsitz: I have no further questions.

The Court: Is that all, Mr. Crary?

Mr. Crary: That is all, your Honor.

[fol. 149] The Court: Now, gentlemen, I have discussed with you the problem I have and, as I said, I can resume at

9:30 in the morning. While it is inconvenient for you, Mr. Crary, it is a pretty vital thing that I carry out this commitment that I have this afternoon. Dr. Silverman, can you be here in the morning at 9:30 with reasonable convenience?

Dr. Silverman: Yes.

The Court: We will start at 9:30, rather than 10:00, and we will go through with nothing but short recesses until we finish up, so that we can get you on your way.

Mr. Crary: I am grateful for this, it may give me a chance to see Niagara Falls.

(Thereupon the court was in recess.)

[fol. 150]

PROCEEDINGS OF MARCH 31, 1964, COMMENCING AT 9:30 A.M.:

The Court: Good morning.

Mr. Lipsitz: May I proceed?

The Court: Yes, Mr. Lipsitz.

THOMAS E. CONNOLLY, called as a witness on behalf of the Plaintiff, and being first duly sworn, testified as follows:

The Court: Before Mr. Connolly begins; this business of this three judge court is bothersome to me here, that Mr. Crary raised, and I think it is a real problem in this proceeding. I want to take this testimony because these people are here. If it is proper, then it is; if it is not, why it has no bearing. I am concerned about whether or not, where you asked me to restrain an action of an office of the State, whether Mr. Crary may not be right on this three judge court principal. I am announcing that for this reason; [fol. 151] when we get through with the evidence and these people are sent on their way, I am going to have serious thoughts from you along these lines because it is a real consideration. Alright.

Direct examination.

By Mr. Lipsitz:

Q. State your name?

A. Thomas Connolly.

Q. Where are you employed?

A. State University of New York at Buffalo.

Q. Do you have any degrees, Doctor?

A. Yes, I have a Doctorial Degree.

Q. In what capacity are you employed at the State University of New York at Buffalo?

A. I'm an Associate Professor of English.

Q. How long have you been employed in the English Department?

A. About eleven years.

Q. How long have you been an Associate Professor?

A. Since 1955.

Q. Do you know the organization or institution known as the Senate at the State University of New York at Buffalo?

A. Yes, I do, I'm a member of it.

[fol. 152] Q. Are you known as a Senator in that organization?

A. Yes, I am.

Q. Did there come a time in the forepart of this year when you made inquiry of a lady working for Dr. Furnas as to the persons whom you represented as a Senator?

A. Yes, I had to send a report to the various faculties that I represented and that gave me the occasion to inquire from Miss Martin.

Q. Did you speak to her?

A. Yes, I spoke to her on the phone.

Q. Did you recognize her voice?

A. Yes.

Q. As a result of your conversation with her did you receive something from her?

A. She sent me a list of the members of one of the faculties that I represent, the faculty without rank of tenure.

Q. Do you have that list with you?

A. Yes, I do.

Q. Would you get it for me? Now, I show you what has been marked Plaintiff's Exhibit P-1 for identification, consisting of a memorandum to you, a second page quoting from the Ordinances and Charter of the University of Buffalo, and three other pages listing names and positions; is [fol. 153] that what you received from her?

A. Yes, it is.

Mr. Lipsitz: Alright, I will offer it in evidence.

Mr. Crary: I object to it, your Honor, it is totally irrelevant, incompetent. The issue here is the status of Mr. Starbuck under the Civil Service law of the State of New York. This has to do with a purely intra-faculty organization, the Faculty Senate.

The Court: I think this has a bearing, possibly, on the reason for—I assume this contains the Petitioner-Plaintiff Starbuck's name, as certified?

Mr. Lipsitz: As a member of the faculty.

The Court: Overruled.

Mr. Crary: It cannot possibly affect the legal status under the statutes.

The Court: One of the contentions is he is being let out for failure to cooperate, or whatever you want to call it, failure to comply with certain regulations. This may have a bearing on exactly why, what his status is, the quality of [fol. 154] the man, how he has been—

Mr. Crary: The basis of my objection is it cannot possibly affect his legal status, simply extra legal as far as the application of the Civil Service Law is concerned.

The Court: I'll receive it.

(Thereupon Plaintiff's Exhibit P-1, previously marked for identification, was received and marked in evidence.)

By Mr. Lipsitz:

Q. I'm not going to ask you at great length, Doctor, to identify each and every person on here, but I ask you first if you have read the list of names and positions on here?

A. Yes, I have.

Q. And are those persons, in general, persons who are performing full-time teaching duties or other kinds of duties?

A. No, they perform other types of duties, not associated particularly with any one school or college, but rather for the University as a whole.

Q. In the right-hand column of the last three pages there [fol. 155] appears some words which I would ask you to merely identify what they are?

A. Those are the titles of their positions.

Q. Are they fairly descriptive of the positions the persons hold?

A. Yes.

The Court: I am thinking of this Baggett case we are all familiar with. Now, the status of this man is important, as I view it, in the light of the philosophy that is behind Baggett, where they say at Page 452: "Although the discharge of a State employee for failure to fulfill the condition of employment by signing the loyalty oath carries no necessary inference of disloyalty of the employee, it would be ostrich-like to ignore the practical reality of public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status." They go on to say: "The severe im-[fol. 156] pact of such a discharge upon an employee whose refusal motivated by consideration unrelated to disloyalty invokes protection of due process with compelling force."

Now, if you take that as the philosophy of the Federal Courts, then I think the status, whether it is in the hierarchy of the State Civil Service Commission or the University level, is properly received for consideration and that is why I let it in.

Mr. Crary: May I be heard on that very point? The Baggett case, I am familiar with it as your Honor has read

from it, I think the Baggett case is entirely distinguishable from the situation we have here because there, if I have it right, the failure to subscribe to the oath itself resulted in the discharge. Here we have a situation where the failure to answer this question is not itself resulting in his discharge, because of any inference which follows from his [fol. 157] subversive connection. The only reason that he is here being subjected to the loss of his employment is because he has refused to answer an inquiry, which counsel has agreed is asked under a valid statute. I stress to you—counsel, perhaps, in an effort to get away from the three judge court requirement, has said that he raises no question of the constitutionality of Section 105 of the Civil Service Law. If he raises no question of its constitutionality, he must concede that the Civil Service Commission, by which he is bound by that statute, has the right to make the inquiry as to the qualifications affixed by that statute. If it has the right to make the inquiry, it has the right to expect an answer.

The Court: Well, supposing it does not get the answer; has he not the right to explain the basis for his failure to answer?

[fol. 158] Mr. Crary: If it does not get the answer, the person from whom concededly they had the right to ask the information has obstructed their proceeding to get the information they are entitled to get.

The Court: They don't want any explanations?

Mr. Crary: But the thing that I think is so important upon the point your Honor has made is, under the New York law—this was specifically referred to in the Adler case, which specifically sustained the validity, the constitutional validity of Section 105 of the Civil Service Law. It did it on the basis that if anyone were declared ineligible for continued employment by the State of New York because of a subversive activity or advocacy, he was entitled to a full judicial hearing with all the rights of due process. This meets the due process requirement which the Supreme

Court of the United States laid down. There is inseparable [fol. 159] from this man's—from the inquiry here and any result which may follow, affecting his employment because of the question you asked him and because of the information which is elicited, he has a full protection by the right to a full judicial hearing written into Section 105. This was sustained in the matter of Hughes and was specifically referred to by the Supreme Court as constituting the due process required in this kind of a matter.

The Court: Tell me again what you think this man Starbuck's status has been and is?

Mr. Crary: I think this man Starbuck is in the classified Civil Service of the State of New York; that because he is in the classified Civil Service he is subject to Section 105 of the Civil Service Law and to having his employment status certified by the Civil Service Commission of the State of New York.

[fol. 160] Now, the position must be separated from the incumbency of an individual in it. The creation of a position as a legal post of employment in the service of the State of New York is one thing; the qualifications of an incumbent to hold that position is another. Under the numeric system of the Civil Service of the State of New York, which is mandated by the Constitution of the State, if the Court please, the Constitution says that all appointments in the public service of the State of New York shall be by merit and fitness, determined where practicable by competitive examination. This is the foundation stone of the Civil Service Law of the State of New York. The Civil Service Law then proceeds—these are matters which Mr. Lipsitz might attempt to develop by testimony, but which I submit to your Honor are prescribed by statutory provisions, they are matters of law. The Civil Service Law divides the public [fol. 161] employment in the State of New York into two categories; the unclassified service, the classified service. The unclassified service, again by statutory definition, are those positions the principal function of which are teach-

ing or the supervision of teaching. This is a fairly narrow definition. There has been disputes between the University and the Civil Service Commission as to what comes within and without that definition. But the Civil Service Commission has made a determination that positions which do not directly involve teaching, the instruction of students, are not in the unclassified service.

Now, a position which does fall within the unclassified service, and all positions of faculty members, in the sense of those who hold professorial titles, who do actually teach students, are agreed to be in the unclassified service. Now, [fol. 162] those positions do not come under the jurisdiction of the Civil Service Commission to classify. They are in the unclassified service, and they have no tenure by the Civil Service Law. The Board of Trustees of the State University, in the execution of its own powers to make regulations for the Government of the University, has adopted the policy which has been put in evidence. These policies are the sole source of faculty tenure. They are policies of the Board, they are not statutory provisions. They provided for that kind of tenure only with respect to provisions on the academic staff, as defined in those policies, which include the titles which I read into the record yesterday, which no one of which Mr. Starbuck holds. They provide for three different kinds of appointments; temporary, term, continued. Term appointments may be made for a term of years. This [fol. 163] is the only place in anything related to employment by the University where a term, a period of years, is provided for. It is provided only to the members of the academic staff. Unless such an appointment is made, and made under the policies, by the President of the University, not the President of the institution he recommends, the appointment is made by the President of the University—

The Court: Let me ask you this, if Starbuck signed that Question 7, is it your position that he would be in the same status he is now, or would he be working away as a full-blown librarian and lecturer?

Mr. Crary: Had Starbuck signed, had he answered the question—

The Court: There is a non-classified on there which somebody, some time, has stricken in some manner, not official, just a pencil line. Somebody started him off on the theory that he was non-classified and changed their minds; why? [fol. 164] Mr. Crary: This was put on there at the institution.

The Court: Wouldn't you think somebody would communicate that to him, rather than strike this off like some grade school kid would?

Mr. Crary: What was on the form, your Honor, were the initials N.C., meaning non-competitive. This was stricken off. To answer your specific question as to what his status would have been had he answered this question; this would not have any bearing whether he was faculty or classified service, because he was asked this question on this form because he is in the classified, his position is in the classified Civil Service. Now, had he answered the question, had he answered no, his certification would not have been made pending investigation as it was, because since he did not answer the question the Commission ob- [fol. 165] viously needed further information.

The Court: Isn't it a fact that you have got this man down with the charwoman and the parking lot attendants and whoever else is out there in this classified business?

Mr. Crary: This is not so, your Honor. At least I like to think—

The Court: Who else is in the class?

Mr. Crary: I'm in the classified Civil Service, I am classified exempt. I am in the classified Civil Service. I point out to you again, the only people in the unclassified service are specific positions which are characterized by law. Elective officers are in the unclassified service; teachers are in the unclassified service, and there are a few others. Everybody else who works for the State of New York is in the classified Civil Service.

Now, once he is in the classified Civil Service, he becomes subject to the jurisdiction of the Commission to make juris-
[fol. 166] dictional classification, which means that he may be put in the position—again, not the individual—the position may be put in the non-competitive class or in the exempt class. If either one of those things are done, he is in the competitive class.

The Court: Let me see that 75 form that is in evidence.

Mr. Lipsitz: The exhibits are all here, your Honor.

The Court: I was looking at that Form 75, Question 7. Anybody that has ever been exposed to teaching, in my mind, would have trouble answering that question. What I am interested in is giving Starbuck, if it is proper, a chance to have a hearing, if he wants to explain something he may, that is not my problem. Here's the point, if I had to answer that, and I taught at the University of Buffalo for a while wherein the teachings of Karl Marx, maybe in English
[fol. 167] Literature came up for comparison, and I began to talk about the various writings of Karl Marx, the Manifesto or otherwise, I wonder if I would not run into this thing: "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or any of its political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means." If you ever, in connection with the course, discussed the Manifesto, the works of Lenin, wouldn't you be teaching within the meaning of that oath?

Mr. Crary: Yes. This again is a question asked because of Section 105. 105 has been specifically construed in the Adler case, particularly, as being a constitutional qualification for public employment. It has been construed as re-
[fol. 168] quiring the knowledge of the unlawful purpose to bring about the downfall of the Government.

The Court: I know I have studied that myself in connection with Smith Act cases; I know the doctrine of Karl Marx and Lenin. Does that make me an advocate because I know about it?

Mr. Crary: The word advocate in the context—

The Court: Teach or advocate.

Mr. Crary: The word advocate, in the context of 105, means to advocate it as a doctrine and believe, and not merely to teach about it. There is a statute—

The Court: That is what I have in mind; Starbuck should be given a right to explain.

Mr. Crary: The point I wish to make about that, your Honor; had he answered the question yes, let's assume the worst—

The Court: If he answered the question yes, he would be in great shape.

Mr. Crary: Had he answered the question yes, he would not have been by that answer automatically deprived—

The Court: He would be given a hearing?

[fol. 169] Mr. Crary: He would not have been automatically deprived of his employment. There is no statute which says that a yes answer automatically deprives him of it. That would have led to further investigation.

The Court: Alright. He said something else, he said: "I prefer not to answer that now until I am satisfied of the relevancy or otherwise of the question," why shouldn't he have a right to explain what he means?

Mr. Crary: Mr. Poppey's testimony indicated that he did try to explain to him why it was necessary.

The Court: Poppey is just an administrator. I am talking about a hearing that he would be entitled to if he was a professor.

Mr. Crary: Had he answered the question yes, it would have led to further investigation by the Civil Service Commission.

The Court: He gives you some hint he is not going to stand and take the Fifth Amendment.

[fol. 170] Mr. Crary: Until and unless the Civil Service Commission on the further investigation had made a finding that he did, within the meaning of 105, knowingly and unlawfully—and those elements are in it—advocate the vio-

lent overthrow of the Government, it could have taken no action. Once it made that finding, if it would, then under 105 would be required to declare him ineligible for continued employment by the State. But when that day arrived he is then protected by 105 with a full right to a de novo judicial hearing on the issue of whether he is or is not.

The Court: In other words, you say he has got to answer something yes or no?

Mr. Crary: I say to your Honor that the cases decided by the Supreme Court have uniformly said that where an individual is asked a question, which the public body, the State office or body, has a right to ask him, and he refuses to answer, he is then guilty of wilfully obstructing a law-
[fol. 171] ful inquiry by a public body, and for that reason alone is no longer qualified to retain public employment.

The Court: I see your point.

Mr. Crary: I think this is the position, I think this can be supported by the cases.

The Court: Alright. I am glad to have your comments.

Mr. Lipsitz: May I comment in a summary fashion about several things that Mr. Crary said? First of all, what he is saying, his view of the law is that the person who answers the question yes, in which case there is a further investigation, and ultimately ends in a hearing—if you answer yes, that person is entitled to a hearing—but the person who is discharged for misconduct, that is, for refusing to answer, is not entitled to a hearing. I don't know of anywhere that principal is supported in any cases in which the doctrine of
[fol. 172] the right to hearing by State employees in educational institutions has been and is being developed. This is exactly what Mr. Crary is saying. One last thing; he said he assumes that Question 7 on that form is a question which they have a right to ask him. I would point out that we haven't mentioned in this hearing Section 3022 of the Educational Law, which refers to the fact that the Board of Regents shall adopt, promulgate, enforce rules and regulations for the disqualification or removal of superin-

tendents of schools, teachers or employees in the public school system in any city or school district of the state, and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the State. They have promulgated such rules and those rules have resulted in the require-
[fol. 173] ment that the certificate, which is attached to our application as Exhibit 5, is the thing that has to be signed by all employees. That is what 3022 says, your Honor. It doesn't say all non-classified employees, it says all employees, it is very specific. It says superintendents, teachers or employees. They assume for their own purposes, and everything is always explained away by saying that that is an internal arrangement someplace, they assume somebody sitting someplace has a right to tell Starbuck that he must answer that question; whereas, the law says, and the rules of the Regents as promulgated say, that he, being an employee, is to be governed by the rules of Regents. They don't go along with that. That is a law they would like to ignore.

Mr. Crary: If your Honor please—

Mr. Lipsitz: That is just in response to the very lengthy remarks of Mr. Crary.

[fol. 174] Mr. Crary: The so-called Feinberg law, which counsel refers to as 3022 of the Education Law, by its terms it was designed to supplement and enforce Section 105. The Civil Service Department long before the Feinberg Law was enacted, had the right and the duty to enforce 105. It is doing so directly here. The rules of the Regents do not make specific provisions with respect to employees, the faculty members and employees of the State University. The rules are restricted to the public schools and the colleges of the state are not in the public school system. Here the Feinberg Law has not become involved because the Civil Service Law is to enforce Section 105. The only purpose of the Feinberg Law ever was to enforce and provide a means for supplementing Section 105.

The Court: You say this University of Buffalo or this State University at Buffalo is not part of the public school [fol. 175] system?

Mr. Crary: Not part of the public school system. The public schools are the elementary and secondary schools operated by the school districts and the boards of education. The higher educational institutions, while they are part of the University of the State of New York, they are not public schools, they are not governed by the provisions of law which relate specifically to the public schools. The teachers in them are not public school teachers, they are college professors.

Mr. Lipsitz: May I say that this is indeed shocking. Every single member of the University of Buffalo staff, faculty people and I understand—well, faculty people, pardon me, I am restricted to so-called faculty people—received a communication last fall or early winter. The communication said: "Enclosed herewith is a certificate" —this is the certificate—"and enclosed herewith is a copy [fol. 176[of the Board of Regents rules." I propose to introduce that by stipulation, Mr. Tiffany said he would stipulate, I believe, those are present and are true copies. It is under those rules that you are required to sign this certificate. Mr. Crary, with what I think is with some degree of audacity, is saying the Feinberg Law and its rules do not extend to faculty members of higher institutions of learning.

Your Honor, in 1953 the law was specifically amended, Section 3022, to add the words, "or rather institutions of higher education owned and operated by the state." They took the same rules which they had promulgated before the amendment, which were designed—it is true they were designed for public schools, secondary and elementary school teaching people—they took the same rules and they told I don't know how many it was, nine hundred [fol. 177] or one thousand people, at this institution, "By those rules, as of 1963, you have to sign this certificate."

He said those rules do not apply to employees of a state institution of higher learning.

Mr. Crary: I haven't said that, your Honor. This is an illustration of the confusion into which this case is being thrown. I have said that in the instant case we are not dealing with faculty members to whom this certificate—who have been asked to sign these certificates, we are dealing with a classified civil service employee who has failed to answer a civil service question.

The Feinberg Law, as such, is not involved in this case. The Feinberg Law, because the public schools and the colleges maintained by the State are not the same thing, was a method in 1953 to extend the Feinberg to make its provisions applicable to those employees of State [fol. 178] university institutions, faculty and others alike. But the Feinberg Law is simply an implementing statute. What it did, it set up a procedure whereby the Regents would conduct hearings to determine and list those organizations which were subversive, after which any proof of mere membership in that organization became presumptive, prima facie evidence of knowing membership, knowing its unlawful purpose; that is what the Feinberg law did. We are not involved in that here because the man has not been asked if he is a member of the Communist Party. He has been asked a question in the terms of Section 105 of the Civil Service Law by the Civil Service Department.

The Court: Excuse me. Now, one of my purposes in getting started early this morning was to get these people from the University on the stand and finished and on their way. I have time later, and we will go into it. From time [fol. 179] to time I might ask you to comment. But this is not the last, so let's go on with the evidence now.

Mr. Lipsitz: Can we stipulate this letter was written and you received a copy, Mr. Crary?

Mr. Crary: Yes.

The Court: Alright.

By Mr. Lipsitz:

Q. Dr. Connolly, did there come a time in the fall of 1963 or the early winter of 1963 when you were asked to sign a certificate for the University?

A. Yes, in December.

Q. December of 1963?

A. Yes, sir.

Mr. Crary: If the Court please, I must object to this line of testimony on the grounds it is completely irrelevant to any issue here. The Doctor's rights are not involved nor his status, what he may have been asked to do. We are concerned solely with the Plaintiff Starbuck.

[fol. 180] The Court: Overruled.

By Mr. Lipsitz:

Q. I show you what has been attached to the application for an injunction here as Exhibit 5, consisting of a document entitled "State University of Buffalo, New York," underneath which there is a caption, "Certificate," and I ask you to look at that, read it, and then tell me whether or not it was a certificate in identically that form or otherwise you were asked to sign?

A. Yes, with the one exception that the date 1955, we were instructed to strike out and write in 1959 in there.

Q. Where the date appears in the last paragraph?

A. I think it was 1959.

Mr. Lipsitz: Instead of offering this as a separate exhibit, may I refer to it as Exhibit 5?

The Court: Yes.

By Mr. Lipsitz:

Q. Were you alone in being asked to sign this?

A. No, all members of the faculty were asked.

Q. As far as you know?

[fol. 181] A. Yes.

Q. Consisting of approximately how many people?

A. I would guess about 900 or maybe 1000 people.

Q. Now, was that request to sign this accompanied by other documents?

A. There was a pamphlet.

Mr. Lipsitz: Would you mark this as Plaintiff's Exhibit 11 for identification?

(Thereupon pamphlet referred to was marked Plaintiff's Exhibit P-11 for identification.)

Mr. Tiffany: You are introducing the rules. Well, of course, the position of the Board of Regents is, your Honor, that no cause of action is alleged against the Board of Regents at all. I wouldn't want my stipulation prejudiced on the position of the Board, namely there was no cause of action alleged against the Board.

Mr. Lipsitz: I am asking that Mr. Tiffany agree that this is a true copy.

The Court: You recognize it as the rules of the Board [fol. 182] of Regents?

Mr. Tiffany: Yes.

The Court: I don't take an inference you consider yourself involved in the litigation. We are trying to vouch for this instead of making proof of it.

Mr. Crary: This is the official compilation by the Regents.

Mr. Lipsitz: It has been identified. I offer it in evidence. It is that document which accompanied the request to sign the certificate, is that right?

The Witness: Yes.

(Thereupon Plaintiff's Exhibit P-11, previously marked for identification, was received and marked in evidence.)

Mr. Lipsitz: Will you mark this for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit P-12 for identification.)

By Mr. Lipsitz:

[fol. 183] Q. I show you Plaintiff's Exhibit P-12 for identification, and I ask you if you can identify that document?

A. I believe this was the covering letter that accompanied both the certificate and the pamphlet.

Q. When you say you believe it was, do you recognize it or not?

A. I believe the copy I saw was a copy of this, not in this printed—

Q. Was the substance of it the same?

A. The substance was the same.

Q. Was it subscribed by a person named J. Lawrence Murray?

A. Yes.

Mr. Lipsitz: I offer this in evidence.

Mr. Crary: This is a correct copy, your Honor. Again, I would object to its relevancy to any question involved within the issues of this case.

The Court: Overruled; received.

(Thereupon Plaintiff's Exhibit P-12, previously marked for identification, was received and marked in evidence.)

[fol. 184] By Mr. Lipsitz:

Q. Dr. Connolly, do people working in the University have any particular time of year where they seek employment, is there any custom or procedure?

A. Usually at the time their professional societies meet for the national meetings, this is the time that people make contacts with other institutions.

Q. Well, more specifically, if a person is dismissed from a position at the University in April or March or February, is there any problem in obtaining other employment at that time in another University or institution of higher learning?

A. It would be usually very difficult to cut out and in in the middle of a term.

Mr. Lipsitz: I have no further questions.

Cross examination.

By Mr. Crary:

Q. Doctor Connolly, you say you are a member of the faculty?

A. Yes.

Q. What is your title?

A. Associate Professor of English.

Q. Associate Professor of English. You said also that faculty members were asked to sign this certificate which counsel showed you?

[fol. 185] A. Yes.

Q. Was anyone other than faculty members asked to sign this?

A. Not to my knowledge.

Q. Were you asked to answer Question 7, which appears on PR 75 form?

A. No.

Q. You were asked to sign the certificate but not to answer the question?

A. That is right.

Mr. Crary: That is all.

Redirect examination.

By Mr. Lipsitz:

Q. I neglected one other question. Do you know, is there a position of lecturer that is utilized at the State University of New York at Buffalo?

A. Yes.

Q. And what kind of a position is a lecturer?

A. It is a position usually intermediate between the position of instructor and the position of assistant professor.

Q. Does it involve teaching duties?

A. Yes.

Mr. Lipsitz: That is all.

Mr. Crary: That is all.

[fol. 186] The Court: That is all.

(Witness excused.)

Mr. Lipsitz: Doctor Silverman, please.

Oscar A. Silverman, called as a witness on behalf of the Plaintiff, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Lipsitz:

Q. Dr. Silverman, in what capacity are you now employed by the State University of New York at Buffalo?

A. Director of Libraries and Professor of English.

Q. How long have you been Director of Libraries?

A. Since February 1, 1960.

Q. You became a Director of Libraries preceding the date of the merger, correct?

A. Correct.

Q. At the time that you became the Director of Libraries did you occupy any other supervisory position at the University of Buffalo?

A. I was Chairman of the Department of English.

Q. When did you cease being the Chairman of the Department of English?

[fol. 187] A. June 30, 1963.

Q. So that that position transpired the take-over in 1962?

A. Yes.

Q. Now, as the Director of Libraries, what libraries do you direct, is there any one?

A. I direct presumably all the libraries of the University, the State University of New York at Buffalo; Lockwood Memorial, Harriman, the Chemistry Library, the Engineering Library, the Physics Library, the Health-Science Library, and nominally the library of the Law School.

Q. Nominally, did you say?

A. Yes.

Q. Now, have you ever been instructed in writing as to your authority regarding hiring for the library staffs?

A. No.

Q. Do you have authority to hire for the library staffs or did you believe that you did before you listened to the testimony in this case? I'll withdraw the question. Do you have authority to hire for the libraries?

A. I have so assumed that I have authority to make recommendations.

[fol. 188] Q. Have you exercised the authority that you have since you have been director of libraries?

A. I have.

Q. In approximately how many instances?

A. Approximately twenty professional librarians, perhaps forty or fifty people in clerical and secretarial positions, and I should think several hundred part-time student assistants.

Q. Now then, has the procedure that you have followed in recommending hiring changed since you became Director of Libraries?

A. Yes.

Q. Tell us the changes that have occurred, that is, what you did before and what you did after the change?

A. With the merger with the State University it became necessary to clear all positions through the Director of Personnel, Mr. Poppey. Previous to the merger, positions

were normally cleared through the Vice Chancellor, then called, for Educational Affairs, Dr. Anderson. These positions were cleared, I assumed, on the authority of my recommendations which I made, having been allotted a budget. The same forms were used after the merger as before, the form previously referred to in this proceeding [fol. 189] as the Pentagon; a copy of which I sign for every person in the libraries; professional, non-professional, students.

Q. In other words, this is approximately in excess of two hundred people, including part-time people, that you have hired?

A. Yes.

Q. The difference in procedure before and after the take-over is that after the take-over you cleared these through Mr. Poppey's office?

A. Yes.

Q. Then—

A. May I add that often these matters were discussed with Mr. Poppey and with Dr. Anderson, especially in the case of a rather important appointment, such as the Director of the Health-Science Library, for whom special arrangement, as to the budget, had to be made. I might add that such arrangements, sometimes slow, were made.

Q. Now, I think you answered this question; none of your recommendations have ever been repudiated or failed to have been approved, is that correct?

A. To the best of my knowledge.

Q. Now then, in connection with the staffing of the libraries, is there a budget for the Division of Libraries?

[fol. 190] A. There is.

Q. Now, does this budget become reduced to a written form of some kind?

A. It does.

Q. Do you have the budget for 1963-1964 with you?

A. I have.

Q. Pursuant to my subpoena?

A. I have. '64-'65.

Q. Yes, the '64-'65 budget. This is already marked for identification as Plaintiff's Exhibit 10, Dr. Silverman, consisting of—

A. I didn't bring the '63-'64 budget.

Q. —consisting of nine pages. I ask you if you would explain how you come into possession of this document, and what information it sets forth, and the procedure of obtaining it?

A. About the end of May or early June we are asked by the Director of Personnel and the Vice President for Educational Affairs to prepare a proposed budget to go into effect the following year. That is to say, very soon now we shall be asked to prepare a tentative budget for '65-'66.

Q. What is the fiscal year beginning, the date, if you know?

[fol. 191] A. May I explain that a bit? The fiscal year begins April 1st, as I understand it—

Q. You have started—

A. But my fiscal year begins July 1st, as far as new employees are concerned. If you examine this budget, for example, you will see that a certain sum of money has been appropriated for '64-'65 on one side of the budget, then it is reduced on the other because it does not become effective until July 1.

Q. In other words, by two-twelfths or one-sixth the amount of money has been reduced?

A. Three-twelfths, one-quarter.

Q. But this is the budget, P-10, which is the result of recommendations that you had made last May and June of 1963?

A. That is correct.

Q. For the forthcoming fiscal year?

A. We go on; that budget was discussed; Vice President Anderson presumably had discussions with others, and in the natural course of events certain of my recommenda-

tions were unhappily reduced, but finally a tentative budget was set up, I believe it went to Albany some time in the early fall to be incorporated in the budget manual, and in the normal course of events I believe that budget would be [fol. 192] approved today to go into effect tomorrow, the 1st of April, and becomes then my official budget, as I understand it.

Q. This document that you have, however, is prepared by whom, if you know? This particular document?

A. In the form that I have it, I presume it was prepared by the Personnel Department, under the supervision of Vice President Anderson.

Q. At this institution in Buffalo?

A. I assume so.

Q. Who gave it to you?

A. It comes through the mail under the name of G. Lester Anderson, Vice President for Educational Affairs.

Q. You mentioned that you started to prepare this budget in May or June of last year at the time that Mr. Starbuck was not employed?

A. Yes.

Q. Does Mr. Starbuck's name appear on this budget, and if so, point out the page number?

A. This is the budget for '64-5, budget to go into effect. The name appears on the last—is the last name on page one, number 15, account line 4391.

Q. If you started to prepare this last May or June, how [fol. 193] does his name get on there in the interim?

A. Through my sending in a Pentagon last September 23rd, dated October 1, which then went through the procedure which you outlined yesterday, and when I get a copy of my budget I find that Mr. Starbuck's name is on it. I have nothing further to do with it.

Q. I show you what has been received in evidence as Plaintiff's Exhibit P-2, and I ask you if that is a copy of the so-called Pentagon that you prepared and submitted for Mr. Starbuck?

A. That is one of the copies signed by me.

Q. Now, in the form that you have Plaintiff's Exhibit P-10, and particularly with regard to the appearance on Page one, Line 15, of Mr. Starbuck, what information is conveyed to you, as far as you understand that?

A. "Starbuck order Library," which is part of the Department of Acquisitions. "NS", not statutory, I believe. "C", under term, continuing. "12" under months, meaning term. The salary is appropriated for '63-4.

Q. Was that a different salary from what he was earning in his initial year?

A. I said clearly, I hope, '63-4. That was appropriated [fol. 194] in 1963-4. We skip a column, we have 1964-5 requested, with a statutory increment shown there, an increment of $258.

Q. Alright.

A. The other columns are not filled out.

Q. Does that mean that in the budget that was returned to you by Mr. Anderson's office it appears that a position for George Starbuck, appropriating that amount of money, has been recommended to the State University of New York?

A. That is what I assume, yes.

Q. For example, does your name appear on there?

A. Yes.

Q. Which page?

A. First page, first line.

Q. Does it convey the same information concerning your prospective employment?

A. Yes, but unhappily it does not show an increment.

Q. I see in the column entitled "term" there is a C after your name and a C after Mr. Starbuck's name; does that convey the same information, continuing?

A. Continuing.

Q. Tell us—

A. Also, you have an I in front of mine, that means [fol. 195] indefinite.

Q. Now, what does continuing, without a letter I mean, in respect to Mr. Starbuck, as far as you understand it?

A. As far as I understand it, C took the place of I even before the merger to indicate that the man was not on a term appointment. The term appointment being precisely what it says. We sometimes in the faculty appoint an assistant professor or an instructor for a term of years; three or four; and after he receives tenure that the term appointment is dropped and the letter C is used. Now, it used to be it was I—

Mr. Crary: Your Honor, I would like to interrupt. May I point out that the complaint alleges that Mr. Starbuck is a non-tenured employee. The term continuing, under the policies of the Trustees, means tenure. Now, we take the allegations of the complaint, he is alleged to be non-tenured. Of course, as a matter of law, we say he is non-tenured.

The Court: I will hear what the Doctor has to say. We understand. You may proceed.

[fol. 196] By Mr. Lipsitz:

Q. Does that complete your explanation of what the C means?

A. As far as I know.

Q. Going back to September of 1963, did there come a time when you had discussions with Mr. Starbuck about employing him?

A. Yes.

Q. Had you known Mr. Starbuck before then?

A. Yes.

Q. How did you get to know him?

A. In 1961 I invited Mr. Starbuck to come here in the summer to read his poetry and to speak about poetry with another person in a joint program during the summer school, on the recommendation of people whom I trusted in Boston.

Q. Following that did there come a time when Mr. Starbuck made inquiry of you, in written form, as to the possibility of employment at the State University of Buffalo?

A. Mr. Starbuck wrote to me from Italy where he was living on Prix de Rome, and asked about the possibility of employment. Not knowing that I was no longer Chairman of the Department of English, he wrote with the idea of being a teacher.

[fol. 197] Q. Did you respond to him?

A. I made a response.

Q. As a result of that, did he and you have conversation at Buffalo, New York, some time in September, 1963?

A. First by phone from New York and then Mr. Starbuck came to Buffalo to be interviewed, not for a departmental job in English, for a possible library job.

Mr. Lipsitz: Now, I think you retained that budget. I want to offer that in evidence. I will see that you are supplied with a copy of it. May I have permission to photostat this and replace it with the photostatic copy?

The Court: You are going to give the original back to the Doctor and offer the photostat?

Mr. Lipsitz: Yes.

The Court: You have no objection?

Mr. Crary: No objection.

The Court: That may be done.

Mr. Crary: No objection to the substitution of the copy.

By Mr. Lipsitz:

[fol. 198] Q. Following conversations with Mr. Starbuck did you offer him any employment at the State University of New York at Buffalo?

A. I did.

Q. When did you offer him this employment?

A. During the week of September 16th, when we had two telephone conversations.

Q. Was that following or before his coming here?

A. Before he came here. I must—I'm sorry, I made a mistake. We discussed the possibility of employment dur-

ing the 16th to the 20th, and no employment was arranged until he came here on the 23rd.

Q. Of September?

A. Yes, of September.

Q. Now, as a result of his coming here, did you make an offer to him and did he accept that offer?

A. I made an offer to him at that time subject to its being approved by the Department of Personnel.

Q. What was the offer you made to him?

A. An offer of an Assistant in Acquisitions, with special concern for ordering books, at a salary stated in that budget—I have forgotten.

Q. Sixty-four something?

A. Sixty-four something.

Q. Did he accept that offer?

[fol. 199] A. After the formality of having the appointment approved through Mr. Poppey, who, in turn, courteously, I think, phoned.

Q. I will go into that. Did Mr. Starbuck eventually accept the offer?

A. Yes.

Q. During the course of your conversation, did you mention to him how long he might expect to be employed at the University?

A. The normal twelve-month appointment with the idea of continuing appointment if he proved satisfactory to us and he wanted to stay.

Q. Did you talk to him about the need of taking an examination for the position?

A. No.

Q. Did you talk to him at all about the need for signing a form of any kind in which the question known as Question 7 would appear?

A. No.

Q. Did you talk to him in any fashion about signing a certificate in the form of the certificate which faculty members have been asked to sign?

A. No.

Q. Were you at that time told by anybody in authority over you that signing that certificate or answering that

[fol. 200] question was a condition of a person being employed by you?

A. That is a difficult question for me to answer. I had not been told specifically but I think, if I may say so, that I was derelict in my duties in not being aware of this.

Q. Dr. Silverman, in September of 1963, what faculty members, if you know, had been asked to sign a certificate?

A. None, as far as I know.

Q. And were you ever advised or told of the requirement of persons coming to work in the library to answer that question, which is Question 7?

A. No.

Q. You were aware of the Feinberg Law, is that correct?

A. I had discussed the Feinberg Law previous to the merger with Vice Chancellor, then called, Puffer.

Q. In any of your discussion before September of 1963 about the Feinberg Law, were you ever advised by anybody in authority over you that a certificate or question of any kind had to be answered or signed in respect to the Feinberg Law?

A. After?

Q. As of September, 1963?

A. After September, 1963 I asked Vice President Puffer [fol. 201] if he and I had discussed this and he recalled to me that the Feinberg Law would be in operation after the merger, and he told me that it had been discussed in the merger proceedings. In other words, he recalled these things to my memory in conversation after September, 1963.

Q. Regardless of whether you had a present recollection in September, 1963, or whether it was refreshed after 1963, was anything brought back to your mind as to the requirement—as to being told of the requirement that a certificate would have to be signed or a question answered as a condition of being employed, as distinguished from the application of the Feinberg Law itself?

A. No.

Q. Then after your meeting with Mr. Starbuck, you started to tell us that you called Mr. Poppey, will you go

ahead and tell us what you and Mr. Poppey spoke about in respect to Mr. Starbuck?

A. I asked Mr. Poppey, or perhaps William B. Ernst, the Associate Director of Libraries, may have been involved in this as well as I, whether we could expedite the approval from Albany for the appointment of Mr. Starbuck.

Q. Did you explain to Mr. Poppey what position you [fol. 202] wanted to appoint him to?

A. Yes.

Q. Did you mention the salary?

A. I did.

Q. Did you mention the length of the employment?

A. I assume that we spoke of it as twelve months appointment. It was certainly so noted on the Pentagon I sent.

Q. Did Mr. Poppey tell you he would see what he could do?

A. Mr. Poppey checked with the appropriate people in Albany and did it courteously and quickly because we were anxious to have the position filled immediately and we were anxious to provide Mr. Starbuck with the position as soon as possible.

Q. Did Mr. Poppey report back to you anything about this pursuant to your request for approval to hire Mr. Starbuck?

A. He did.

Q. What did he report to you?

A. Reported that the approval had been given.

Q. As a result of that did you then submit to him the Pentagon form, P-2?

A. Yes.

Q. In other words, you cleared this through Mr. Poppey [fol. 203] before you put in the Pentagon form?

A. That is the normal course, yes.

Q. By the way, is that the normal course of recommending people that have otherwise been employed by you in the Library Department?

A. Yes.

Q. Now, Dr. Silverman, as the head of the English Department, the Chairman of the English Department, did you have authority to sign Pentagon forms?

A. No.

Q. Who had the authority over you in respect to anybody that you would like to have employed, as Chairman of the English Department?

A. The Dean of the College of Arts and Sciences.

Q. You are subordinate to him in terms of employment rights and abilities?

A. Precisely.

Q. Is that right?

A. Yes.

Q. Dr. Silverman, in September of 1960, when you became—that is when you said you became Director of Libraries?

A. No, February, 1960.

Q. February, 1960; approximately how many full-time people did you have in the library, in the Division of [fol. 204] Libraries?

A. Clerical and professional, totaling approximately forty-five.

Q. At the time that Mr. Starbuck was notified that he was going to have to be terminated, how many did you have on the staff?

A. Clerical and professional, approximately one hundred, perhaps one hundred ten.

Q. Now—

A. This is excluding part-time.

Q. I said full-time. This increase from the forties to around a hundred all has been a result of recommendations by you of hiring, is that correct; you or Mr. Ernst?

A. Yes.

Q. Directly by you in the signing of the Pentagon form?

A. I only am authorized to sign the Pentagon.

Q. Have some of those positions, that is the personnel hired by you, been filled since the merger date?

A. Yes.

Q. And since the merger date have some of those positions been filled without taking any examination?

A. Yes.

Q. In connection with those, about how many of those [fol. 205] have been filled without taking the examination?

A. We must discriminate between professional and non-professional. The clerical people have taken an examination, and are not recommended to us until they have passed the examination satisfactory to the Personnel Office. But the professional people have not taken an examination, except, I believe, in one case where there was an oral examination, pro forma, I would think.

Q. You mean created by you or Mr. Ernst?

A. Mr. Ernst, of a professional.

Q. In other words, subtracting the one, how many professional appointments have you recommended without an examination since the merger?

A. Between eighteen and twenty-two.

Q. Have you ever been informed concerning any of those that they were only certified to be employed for a period of six months or four months or any period?

A. No.

Q. Did there come a time when I showed you an affidavit which appeared to be signed by Harvey Randall in your office?

A. Right.

Q. Last week, did you read that affidavit?

A. I did.

[fol. 206] Q. Before you read that affidavit were you aware of any claim ever that Mr. Starbuck was only hired until April 1, 1964?

A. No, except as I have understood in the last day, that is, perhaps should have understood by inference before, that the budget year begins April 1st. But I have assumed that this is a bookkeeping or accounting device and I have assumed that our operation will continue.

Q. Well, my question is, were you ever informed by anybody in the institution that Mr. Starbuck's employment was only good until April 1, 1964?

A. No.

Q. And the first time you heard about it is when you read Mr. Randall's affidavit, is that correct?

A. Well, if that's what Mr. Randall's affidavit states. I'm not—

Q. I call your attention to Paragraph 14 of Mr. Randall's affidavit. I think you have a copy of it?

A. Yes.

Q. Excuse me, not 14, Paragraph 10, the last paragraph on page two and the last sentence thereof in which he said, "It is expressly valid in any event only until April 1, 1964."

A. I did not make an assumption.

[fol. 207] Q. Was this the first time you were told of a claim that is what his employment was?

A. Yes.

Q. Following the submission by you of the Pentagon form, were you given any notice of any kind that Mr. Starbuck was approved to be hired, or was that what you received verbally by Mr. Poppey?

A. That was received verbally by Mr. Poppey. Then after the Pentagon was sent over and not returned, Mr. Starbuck began his employment, and we made the assumption he was employed, of course.

Q. He started receiving payroll checks eventually?

A. With the usual delay of a new employee, he did.

Q. Now, I take it when you talk about professional employment; Mr. Starbuck's position was in the professional grouping of employees?

A. Yes.

Q. Dr. Silverman, did there come a time in the spring of 1963, at Utica, New York, where you and other chief librarians had a meeting with Mr. Randall?

A. Yes.

Q. Was this a meeting of chief librarians of the State University of New York institutions?

A. The various units, yes.

Q. During the course of that meeting was there any [fol. 208] discussion about whether professional positions in the library should be classified or unclassified?

A. That is right, there was.

Q. Did you make any statement at that time?

A. Not that I recall in detail.

Q. Did Mr. Randall?

A. Not that I recall. I think I can give you the substance.

Q. Give us the substance of the discussion?

Mr. Crary: I object. This is getting fairly far afield and remote from any issue presented here; the conversation is outside of the scope of the issues. The question of what the opinions of individuals were in matters which are controlled by State law. I object to this line of testimony.

The Court: This is Mr. Randall, isn't it, and the Doctor talking?

Mr. Crary: Discussions at a meeting.

The Court: Overruled. What is the date of that?

Mr. Lipsitz: Dr. Silverman can identify it, he said the spring of 1963. Do you remember more precisely when it was?

The Witness: April, 1963 at Utica.

[fol. 209] The Court: You may proceed.

By Mr. Lipsitz:

Q. Tell us the substance of the conversation; this is in respect as to whether these should be classified.

A. Very briefly, the whole problem of whether the professional librarian should be considered an educational officer and hence be placed in the unclassified grouping, or be considered a classified person, has been a big concern

of the profession of the librarians for some time. Librarians take the view they are educational officers since they are indirectly always and sometimes directly associated with the educational process, and hence they should like to have the same kind of status that is accorded faculty, which is that of the unclassified. Sympathy, it seems to me, has been evinced by members of the State University Central Administration toward this desirable end. This, in effect, was the substance of our conversation. I could not be more specific.

Q. At the present time have you been advised whether or not the position held by Mr. Starbuck is in the competitive civil service class?

A. Only as I have learned through listening to the [fol. 210] evidence given yesterday.

Q. Before you came yesterday have you ever received advice from anybody in the State University about that?

A. No. I think I must be allowed to explain that, if I may, your Honor?

Q. Go ahead.

A. It has been a difficult problem about the classification. I don't think it quite fair to Mr. Randall and the State University people to assume they have not been very, very solicitous about the problem of classification or the non-classification of people in the libraries. In a sense, the fact there were no classifications made and, I suppose, no examinations given, might be considered evidence of their concern. These people are professionals, and should be accorded the same rights and privileges as faculty.

Q. Well, at the present time, however, there has been no competitive examination?

A. That is correct, there is no competitive examination, to the best of my knowledge.

Q. You haven't been told that?

A. At the State University of New York at Buffalo.

Q. Is there such a thing as a written job description [fol. 211] for the job held by Mr. Starbuck?

A. Job descriptions were prepared some time ago when it was announced by the State University that Civil Service would come and classify the library jobs. That classification was never done, the job descriptions were prepared.

Q. By you or somebody under your supervision?

A. Under my supervision.

Q. Do you have that job description here?

A. I have several job descriptions here.

Q. Were they submitted to anybody?

A. They were submitted to the civil service people.

Q. Have you ever been told those constitute any official approved job description for the job of assistant in acquisitions?

A. They haven't been sent back to me with such notation. We have operated more or less along these assumptions.

Q. Dr. Silverman, I think you were here yesterday when I read from Section 64, Subdivision 3 of the Civil Service Law. I don't want to burden the Court with rereading those sections. That is the section on temporary appointment and which the State claims was the authority for hiring Mr. Starbuck. Did you ever discuss with Mr. [fol. 212] Poppey or Mr. Randall, or anybody else, a restriction on your right to hire, in terms of having to certify that the job was on the occasional basis?

A. No.

Q. Is Mr. Starbuck's job on an occasional basis?

A. Not to my knowledge.

Q. When you hired him did you intend that he work full time?

A. I did.

Q. Has he worked full time?

A. Yes.

Q. Did you ever discuss with anybody, Mr. Poppey or Mr. Randall or anybody else, the desirability or the request

to hire Mr. Starbuck on a full-time or regular part-time basis in a temporary position to conduct a special study or project not exceeding eighteen months?

A. No.

Q. Was there any such consideration involved in hiring Mr. Starbuck?

A. No.

The Court: What does Mr. Starbuck do out there in the ordinary course of a day's work? Do the students come and ask for his advice and counsel on literature, for [fol. 213] example? What does he do?

The Witness: No, your Honor, the students do not normally have access to Mr. Starbuck. In his position in the library he works in the department commonly called acquisitions or sometimes called book selection, and specifically he attends to the ordering of books, although makes selections. His judgment is used in deciding which, among several, editions might be bought, or in some cases whether or not a book might be bought. He does have contact fairly frequently with members of the faculty who do the bulk of the suggesting of the ordering of books, but not the students.

The Court: But he would draw upon his skills as an English major in his work, would he?

The Witness: He would. Not only as an English major and graduate student, also from his editorial experience in a publishing house in Boston.

The Court: Alright.

[fol. 214] Mr. Lipsitz: I have no further questions of this witness.

Cross examination.

By Mr. Crary:

Q. Dr. Silverman, you have testified that you were employed at the former University of Buffalo prior to September, 1962?

A. That is correct.

Q. You know that on that date some change took place in the ownership and maintenance of the University of Buffalo?

A. I do.

Q. You know what the change was?

A. Well, I have read the merger agreement several times, but I confess certain parts defeat my understanding. I do understand in general, yes. I don't mean to be facetious about it.

Q. Do you understand it then became a State institution?

A. Precisely that.

Q. Owned by and operated by the State of New York?

A. Yes.

Q. Now, did it occur to you that as a result of this the institution then became governed by all the provisions of State law?

A. Yes.

[fol. 215] Q. Which by their terms had application to it?

A. Yes.

Q. And specifically that employment by the University thereafter would be State employment and that it would be governed by State law?

A. Yes.

Q. Now, you have indicated that you have some responsibility in the area of hiring library personnel. In discharge of those duties did you make any efforts to familiarize yourself with the requirements of State law relating to employment?

A. In a general sense I did, and at the time of the merger there were several meetings at the Dean's Council, as it is called, of which I am a member, and to which Mr. Poppey and I believe Mr. Price may have come to tell the Dean's Director, which I am a director, something of the difficulties. But on the whole, I think we, or at least I found Mr. Poppey and Dr. Anderson, the Vice President for Educational Affairs, so competent that I simply went

along with the formal procedures. In other words, the forms were not changed.

Q. You knew there was a Personnel Office?

A. Yes.

Q. And you knew that the function of that Personnel [fol. 216] Office was to assist you in fulfilling your personnel requirements?

A. Yes.

Q. You did work through that office?

A. I did.

Q. Now, you have spoken of the meeting at which Mr. Randall was present, where the question of the proper—not the legal, the proper, in your opinion—place to put librarians was discussed. You have indicated, I think, your opinion to which you got some sympathetic response from the administration of the University, that librarians ought to be in the educational unclassified classifications. Did anyone tell you that they had been placed in the unclassified service?

A. No.

Q. To your knowledge, are they in the unclassified service?

A. To my knowledge they are in this kind of gray area, neither classified nor unclassified, because Civil Service—

Q. Do you understand—

Mr. Lipsitz: Excuse me. I object to this, I think he should be able to finish the answer.

[fol. 217] The Court: Do you have any reason not to have the Doctor tell us about the status?

Mr. Crary: I apologize, your Honor.

The Court: Alright. Tell us about the gray area they now enjoy.

The Witness: Well, they are neither classified nor unclassified. I think the phrase is written on the thing, it doesn't say NS, which I believe means non-statutory. It is my understanding we are all members of the Civil Service, but I am unclassified as Professor of English.

Presumably, I ought to be classified as librarian, I am not, unless I'm in error.

By Mr. Crary:

Q. What connection do the initials NS have with the unclassified or classified service, do you know?

A. I took it that NS was a temporary expedient until classification procedures and policies had been established.

Q. You speak of classification procedures, classification procedures by whom, Dr. Silverman?

[fol. 218] A. Presumably the Civil Service. They never come to do it.

Q. Do you understand that the Civil Service Department has no concern with the classification of the unclassified service?

A. That is right.

Q. They are only concerned with classifying those people in the classified service?

A. Yes.

The Court: What is that; what does that NS stand for?

Mr. Crary: Your Honor, this is a budgetary symbol.

The Court: I thought it meant no status.

Mr. Crary: It appears in the Appropriation Act, it means non-statutory. It means that particular position does not have a salary which is fixed by some statutory provision. With respect to the classified service, it means the position has not yet been allocated to a salary grade. That is all it means.

The Court: If it is neither fish nor fowl, the position, what does the Civil Service have to do with it at all?

[fol. 219] Mr. Crary: Civil Service has to do with it because the position is subject to the jurisdiction of the Civil Service Commission by law.

The Court: Why? It isn't classified, it is nothing.

Mr. Crary: This position is not in the unclassified service. It is therefore in the classified service as a matter of law.

The Court: In other words, if something is not classified, then it is classified; where does that come from?

Mr. Crary: From Section 40 of the Civil Service Law. Section 40 says that all positions are in the competitive class unless by specific action of the Civil Service Commission they are placed in either the non-competitive or exempt. The statute says this.

The Court: Alright.

Mr. Crary: Your Honor has asked about this particular position, and again I can refer to the statutory provision. [fol. 220] The statute is Chapter 980, the so-called merger legislation, which was designed to take care of this very difficult problem of the incorporating as a body the existing staff of the University of Buffalo. This presented a difficult administrative problem. Because of the requirements of the State Civil Service Law special provisions had to be made for it. Those special provisions in terms were that all of the positions, other than those in the unclassified service, which has a statutory definition, were considered to be in the non-competitive class pending classification by the Civil Service Commission. This was to give some legal status in the employment of the State in accord with the Civil Service Law, because of the necessity of taking them over and continuing the operation of the University of Buffalo without interruption, and [fol. 221] that is what was done. This was all pending the opportunity for the classification division of the Civil Service Department to go in there—and Dr. Silverman has just testified about preparing a job description for this purpose—to go in there and find out exactly what the duties of these jobs were and where they ought to be put into the normal pattern of State Civil Service. This job has not been finished. It involves some twelve hundred positions. It has not been finished. True, the statute contemplated it should be done within a year, but it has not been possible to do it, it was too big a job.

In the meantime you had to keep the services and functions of the University going, you had to resort to such pro-

visions of the Civil Service Law as were available to you to enable positions to be filled. That is what was done. [fol. 222] Chapter 980 also specifically said that this non-competitive status, which is a recognized status under the Civil Service Law, applied only to those then working for the University of Buffalo on the date of the merger, and that it also says in specific terms that all new appointments, all vacancies in existing positions, should be filled thereafter in accordance with the Civil Service Law regulations. That is why Mr. Starbuck's position, whose appointment was after the merger, came to be filled. His appointment had to be done in compliance with the Civil Service Law. Because the position had not yet been classified by the Classification Division, they were not in a position to have established a competitive examination for it. They permitted it to be filled under Rule 64-3. It could not have been filled without some authority as that, it could not have [fol. 223] been filled at all.

The Court: What does CC mean?

Mr. Crary: Classification and compensation. There is a division of the Civil Service Department known as the Classification and Compensation Division. Its powers and duties are prescribed and spelled out by Article 3 of the Civil Service Law. Its function is to assign titles to positions according to their duties; to allocate those positions to statutorily prescribed salary periods. When this is done and the position is securely classified as competitive, they will be in a position to establish competitive examinations and fill it from eligible lists established by competitive examinations. When that is done the person who is so appointed will become a permanent appointee, once he has qualified as prescribed by law. Until that can be done, the only way the position can be filled, consistent with the [fol. 224] Civil Service Law of the State, is to get permission and certification from the Civil Service Department to fill it on this basis. It can't give this certification for longer than eighteen months. The only reason that it made this certification subject to a termination April 1st is be-

cause it was made pending investigation because of the failure to answer the question.

The Court: Let me ask you something. Supposing this were an unclassified position and somebody out there—I'll just use Dr. Silverman for illustration purely—wouldn't sign Question 7?

Mr. Crary: If this were an unclassified position, your Honor, it would not come under the jurisdiction of the Civil Service Commission, this particular form would not have been used, another form would have been used. We would then be in the area governed by the Feinberg Law specifically.

The Court: Yes, that is right. Who drew Number 7 up; [fol. 225] have you any idea how long that has been around?

Mr. Crary: This is the standard Civil Service Department of Audit and Control Form that has been in use. I can't say of my own knowledge how long. I know it has been used for some time, and that the question was formulated by the Department of Civil Service.

Mr. Tiffany: It is used in my office, that form.

The Court: That doesn't make it right, Mr. Tiffany.

Mr. Tiffany: No.

Mr. Crary: It is very similar to the question asked to all applicants for Federal Civil Service positions.

The Court: I can guarantee you it is not, because that word taught or advocated is not the form used in the Federal system.

Mr. Crary: I do know that the Federal Government makes this kind of inquiry, whether it's in the precise words—

The Court: I am off the mark. I wanted to find out, and [fol. 226] I recall now that it has been discussed before that the unclassified people are assigned something else.

Mr. Lipsitz: May I say one thing? Mr. Crary said that the reason that he was certified only to 4/1/64 is because of his failure to answer the question. I think that the certification was given well in advance of the time he was asked to answer the question. So I don't think I understand that at all.

Mr. Crary: If the Court please, the certification consists of the Civil Service endorsement on that form upon which he refused to answer the question.

The Court: That apparently was in November when Simmons—

Mr. Lipsitz: In other words, he was employed for several months without being asked to sign anything.

The Court: Well, I suppose somebody has got to go around checking it. Let's finish up with Dr. Silverman, if you please.

[fol. 227] By Mr. Crary:

Q. Dr. Silverman, you said at one time in your testimony that you sent this matter through for approval of Albany?

A. I didn't say it precisely that way. I said that I consulted with Mr. Poppey who, I assume, got approval from Albany.

Q. You used the phrase "approval of Albany"?

A. Yes.

Q. Now, can we assume that indicates you knew that it required some approval?

A. Yes. I think in justice to me you must see that I do understand that there was a new way of employing people since the merger. I followed that procedure in seeking Mr. Poppey's advice and approval, using him as the conduit to whatever authority was beyond him.

Q. When you say Albany, what did Albany mean to you?

A. Albany meant Mr. Randall, I believe.

Q. Did you understand that it required the approval of the Civil Service Department?

A. I suppose I may have made that inference without having it come directly to the surface of my mind.

A. Are you saying you didn't know whether it did or did not?

[fol. 228] A. Since the classification procedure has never taken place I didn't know whether—I confess I'm in doubt as to whether these people have civil service classification

status. I do understand all of us unclassified come under Civil Service.

Q. You said you were anxious to have the position filled?

A. Yes.

Q. Did you make some representation to that effect to anyone, to Mr. Poppey?

A. To Mr. Poppey, yes.

Q. As a result did you request him to make every effort he could to get it filled immediately?

A. I did.

Q. Did you make any effort then to satisfy yourself as to what he had to do with getting the position filled?

A. Mr. Poppey phoned me when he found the approval forthcoming from the proper person in Albany.

Q. Did you make an effort to satisfy yourself as to what the nature of that approval was?

A. Only as Mr. Poppey gives it to me, and on the assumption that Mr. Poppey knows the procedures.

Q. You spoke of the normal twelve month period; what do you mean by the normal twelve month period of employ-
[fol. 229] ment?

A. As an academic person, teaching only, we speak of a ten month term. As a librarian, in the administration, generally we speak of a twelve month appointment.

Q. You were simply referring to the length of the academic year?

A. The distinction between the teaching and the administrative. The librarians come in under the administrative, those are twelve month appointments. They are paid twenty-six times a year, opposed to the faculty, I believe, who is paid twenty-one times a year.

Q. By the normal twelve months you meant he was not being paid on the ten month academic year but on the twelve month non-academic?

A. That is right. If I may extend this remark, I suppose I assumed that he would come under the July 1 to July 1 procedure, which is the librarian's twelve months.

Q. You testified from a budget, may I have that?

A. I think it was put in evidence.

Q. You have referred to Plaintiff's Exhibit P-10 as a budget; where was this prepared, Dr. Silverman?

A. I suppose it was prepared in Mr. Poppey's office with [fol. 230] the assistance of Vice President Anderson, and then I suppose it was approved by the Bureau of Budgets and Audit Control in Albany. The preliminary work was done by me. This isn't my work, it would not be official.

Q. Do you know where the money comes from to pay the salaries of the employees of the State University of New York at Buffalo?

A. I do.

Q. Where does it come from?

A. Appropriations from the Legislature.

Q. This is not an appropriation, is it?

A. No, sir.

Q. It is the request for an appropriation, isn't it, an estimate of need?

A. Not in my understanding. This I believe is—I believe my preliminary working papers would be the request, I believe this is—

Q. It bears on its title "Budget Proposal for Fiscal Year '64-'65," that is what it says?

A. Yes.

Q. Can we assume this is the request which is made for funds by the University at Buffalo?

A. I suppose so, but I receive this from the appropriate office as my working papers for the coming year.

[fol. 231] Q. Now, do you know whether or not all of these '64-'65 request items were actually appropriated by the State Legislature?

A. Not to my knowledge, but on my assumption.

Q. Do you understand that if and when the State Legislature enacts on budget requests it will put the names of the incumbents of particular positions in the Appropriation Act?

A. I should assume not.

Q. Have you ever seen it in the Appropriation Act?

A. No.

Q. You assume it would not. Of course, the Appropriation Act is a statutory provision which your Honor will take judicial notice of?

The Court: Yes, I will.

Mr. Crary: I think those are all the questions I have for Dr. Silverman.

By Mr. Lipsitz:

Q. Dr. Silverman, of the approximately eighteen or twenty persons you have recommended for hiring in professional positions since the acquisition, have any of them received any document constituting an agreement to employ them for a particular period of time, signed by you or any-
[fol. 232] body in the State organization?

A. Not to my knowledge.

Q. Would you know if people received those things?

A. The Pentagon form with the approval is returned to me, the sixth copy, I believe. Perhaps the seventh, this copy that goes into our personnel files.

Q. That constitutes the only document evidencing the arrangement for the employment?

A. In my office.

Q. Yes. Now then, starting with September 1962, a period of some nineteen months ago, you have hired or recommended for hiring eighteen to twenty people in a professional capacity in the library, is that correct?

A. Approximately that.

Q. And as far as you know the only thing evidencing their employment arrangement, that you are aware of, is the Pentagon form?

A. That is all there is in my office, as far as I know.

Mr. Lipsitz: That is all.

The Court: Nice to see you again, Doctor.

We will take a short recess.

(Thereupon a recess was taken at 11:20 a.m.)

[fol. 233] (Proceedings resumed, pursuant to recess, commencing at 11:45 a.m.)

Mr. Lipsitz: Mr. Starbuck is our last witness.

GEORGE E. STARBUCK, called as a witness in his own behalf, and being first duly sworn, testified as follows:

Mr. Lipsitz: Before he testifies there is another exhibit, by stipulation, I am going to be able to offer.

The Court: Let me see that so-called Pentagon.

(Thereupon Plaintiff's Exhibit P-13 was received and marked in evidence by stipulation.)

The Court: Let me ask you something, if you will, Mr. Lipsitz. This is sent to the Chancellor of the University recommending the appointment of the applicant. There is some place for an acceptance on here. How does the man [fol. 234] know, when does he get a copy of this?

Mr. Lipsitz: The employee?

The Court: Yes.

Mr. Lipsitz: He gets nothing.

The Court: Do you know about that, Mr. Crary? This is directed to the Chancellor, and I understand it has been in effect for a long time before the merger, and then there must be some action on that, I suppose?

Mr. Crary: I confess to my unfamiliarity with that form. I think the testimony is it is an internal form at the University of Buffalo. I cannot, of my own knowledge, tell you much about that form.

Mr. Lipsitz: I think the testimony is in the record through Dr. Silverman.

The Court: I just don't remember.

Mr. Lipsitz: He said this, in its number of forms prepared, goes to Mr. Poppey's office and one comes back to him for the files of the employee. That is where he got it,

where it comes from, that is the policy. The next thing [fol. 235] he knows is the man is receiving a salary.

The Court: Mr. Crary, what bothers me about this; this is September 23rd, apparently the date this was forwarded by Dr. Silverman or something was done with it. Then we wait until 28 October, 1963, more than a month later, then they make out this form 75. Well, of course, I must be candid with you, the thing that bothers me about Mr. Starbuck is that he did not know about this 75 or anything else. Apparently someone said to him, "You are on the way," apparently, he probably got a paycheck between the—at least he earned his money—

Mr. Crary: He couldn't have gotten a paycheck until the 75 form went in. That is part of the procedure for getting him on the payroll.

The Court: What I am trying to say is that the whole spirit, as I understand it, of the Court's desire to avoid [fol. 236] summarily dropping a man because he won't sign some type of loyalty oath—back in the McCarthy days, the minute you had any question about whether you had a leaning, you were finished. I don't know how it is now. That is what bothers me. I am looking at this in the broad view of a decent man here, who starts to work, an able fellow, and he has principles why he does not want to sign that thing. What there might be I don't know, and I don't care, because that is not my problem. The question I have is, shouldn't he have a chance, regardless of status, to at least go before a proper board and give his reasons.

You may say, "Technically, no, because he does not fit the mark, he is not unclassified, he is in a limbo somewhere, he hasn't met the conditions precedent of answering this at all." I know all that, but the public image that Mr. [fol. 237] Starbuck has, and it may not bother me at all, but it might bother a big section of the community. He starts out in a responsible job, he is without any knowledge of this thing; and a month or more than a month later he is met with this form and they say, "You've got to sign that." He declines for reasons known to himself, and then the

rug is pulled out because you haven't met the condition precedent. Whether you and I care about Question 7, the public reaction we know, at least it used to be and I think there is some of it left. That is what I see in the spirit of these cases in the Supreme Court, straining sometimes to give a person that chance to clear the air about his life and character.

Mr. Crary: The cases certainly, your Honor, give to a man as a matter of constitutional right—I think that's what we are concerned with, a civil right, a man who has [fol. 238] been deprived of his employment or any of any status because he is alleged to be subversive, the right to come in and explain either that he was not a knowing participant in the unlawful matter, which has been held to be unlawful by the Supreme Court. A man who refuses, and since he has refused deliberately and has been requested to explain why, the State law requires that we would say it is a wilful refusal to give information to enable the making of a determination. Let me further point out that this is not a disclaimer or loyalty oath, the failure to file which itself causes his dismissal by virtue of the statute or the rule or which imputes to him any unlawful subversive connection. This is an inquiry looking for information to enable a constitutionally constituted state body to make an inquiry which it is duty bound by law to [fol. 239] make. He is wilfully refusing to cooperate with them, give them the information. If he gives them the information, this does not become public, this is not published by the Commission, and it does not result in and of itself of an administrative determination, but it leads to an investigation of a matter, which counsel has agreed the statute under which they are making the investigation is constitutionally valid, and well he might because the Supreme Court so held.

The Court: You said that my inquiry before, that the words "taught or advocated" you interpreted that to mean teach and advocate. Now, I am not so sure of that. There is a lot of people in the community that don't want to talk

about it, don't want to have people hear this stuff. We have had a fellow barred out there by a court from coming [fol. 240] and letting the people hear what he has to say, evaluating it as—

Mr. Crary: If the Court please, I was the counsel in that case. It is on appeal to the Court of Appeals. I intend to defend the rights of the students to invite that speaker to speak at the University of Buffalo just as vigorously as I am now defending here.

The Court: However, there are people in the community who don't want students to even hear there is such a thing, it is a dirty work, Communism.

Mr. Crary: I would point out that in the law of the State of New York enacted recently is a requirement that Communism be taught about in the public schools, the students be taught about it, so that clearly we are not construing Section 105 of the Civil Service Law—

The Court: That wasn't in effect a few months ago.

Mr. Crary: That was enacted, certainly not this ses- [fol. 241] sion, either the last one or the one before. It is now a part of the curriculum.

The Court: The whole thing is this, I can conceive very nicely of the most loyal American teaching all kinds of ideologies, discussing it with their student body, because I am convinced that such a student body if they have loyalty, cements that loyalty by hearing the pros and cons and making up its own mind as to where the virtue lies.

Mr. Crary: That is not what the question asked.

The Court: Question 7 would give me trouble. I don't think that it means teach and advocate necessarily. They have chosen the words "taught or advocate", and as I said before, there is a big section of the population, or there was one, that don't want to hear that word or any of the teachings taught to their little fellows.

Mr. Crary: I think in the cases in which this kind of [fol. 242] question has been involved have pointed out that where the words "advise, teach or advocate" are used in context, and not pulled out and considered by themselves,

but in the context of the unlawful overthrow of the government by force and violence, that those words then ask a question which may properly be asked as a qualification.

The Court: Alright, assume you are right. Here is a man whose major is poetry and the art of rhyming, a major in English. He reads that thing and if he is acute he sees "taught"; and maybe he sometimes has taught something along the lines "that is what they did in this country," or another, "here is the good of it all, here is my view of the evil of it all."

Now, what he is saying, he said, "I prefer not to answer, not finally, at least until the necessity and the relevancy of this question is properly explained to me." Now, to me, [fol. 243] my reaction is that he hasn't signed it, he doesn't say, "I will not sign." I should think that would be the typical hearing situation.

Mr. Crary: I think we have testimony in the case that there was an effort to explain to him the relevancy of the question, namely, 105 of the Civil Service Law.

The Court: That doesn't mean much; that is like handing him the statute and saying, "Read that and then you will understand."

Mr. Crary: Here is an explanation by a constituted public body, sworn to uphold the Constitution and laws of the State of New York; that we must ask you this question because it is our duty to establish this qualification.

The Court: You haven't got a no or yes, you have something that to me means that man has a point, "I want to hear why this is necessary."

Mr. Crary: I think the statement itself—I may be wrong [fol. 244] —I think it says, "You may accompany your answer with any further explanation." Let's assume that Mr. Starbuck had said, "Well, I am not sure whether I can answer this question yes or no, I would like to accompany it with this explanation." He could explain that at some point in his career he explained Communism, Marxism, subversion or subversive doctrines to a class, and for this reason he was not sure. This explanation would then have

been taken under consideration by the Civil Service Department and that answer would not have itself lost him his employment. It would have led perhaps, to further investigation, perhaps to a determination on the face of it that he was not disqualified under 105. The only thing that disqualifies under 105 is a knowing, unlawful participation in advocating, teaching that the Government should be [fol. 245] overthrown by force or violence. 105 clearly means that no more—

The Court: Give me that 105, will you?

Mr. Lipsitz: He talks about offering explanations; there is nothing on the form about offering explanations.

The Court: There isn't anything here I see, unless it is in some catch-all somewhere.

Mr. Lipsitz: He also insists this is a sworn, constitutional duty of some kind of somebody to ask these questions. Nothing in the law says that. The law states that a person who is ineligible by virtue of having participated in the activities the Legislature says are improper may not be employed. We do not quarrel with that law.

The Court: What he said was that in order to find out whether such a person has done so, we are entitled to a few answers to evaluate.

Mr. Lipsitz: That is correct, we don't attack that in this [fol. 246] proceeding. The question, however, is more than just a simple question of do they have the right to ask that question, because I have explained to your Honor, and as I think the evidence we have introduced will show, the law requires that all employees be subjected to Feinberg Law procedure, and the Board of Regents said that about all employees of the institutions of higher learning, and the Feinberg Law procedure does not have this involved difficulty to understand, sometimes difficult to answer questions. It has a simple statement, "I am not now a member of the Communist Party, and if I was, I conveyed that fact to the President."

The Court: Let me ask you; here is a man, a man with a fine academic background, at least as far as the record is

concerned, who entered into this employment in good faith with Dr. Silverman, and a month later he is met by Form [fol. 247] 75, which to him for many reasons, for some reason, is offensive to answer Question 7. Now, we also know that his job is kind of in the limbo presently. It is classified because it hasn't reached the unclassified status. There has been indication the University may go along with that. He doesn't say, "I refuse to answer that," he says, "until I know more about it." As a practical thing, why doesn't the State give him a hearing? Now, instead of taking two days and splitting hairs over what the cases have said, why don't they say—I can see we wouldn't want to set a precedent—I don't see how you set a precedent over a man in a status which one of these days that status is going to be finalized. It seems to me it is equitable, with no precedent established, to say, "Look, Starbuck certainly came in and has been employed as far as we know without [fol. 248] knowing of this obligation; Dr. Silverman, he never mentioned it to him." Dr. Silverman is basically an English teacher, not an administrator. You can see that by what he knows about the budget. He has Poppey, he should be able to rely upon Poppey, not himself. He is not a business man. It seems to me under all the circumstances in this case that the State would not lose one bit of its solemn obligation by giving a hearing. If you don't want to answer that, you don't have to. I am talking now more about the equities than I am the law.

Mr. Crary: If the Court pleases, let me try to answer that the best I can by pointing out that attached to the Plaintiff's moving papers, Exhibit 3A, there is a letter addressed to Mr. Starbuck by Harry Poppey, based on instructions which Mr. Poppey received from the Civil Ser- [fol. 249] vice Department.

The Court: That is in the petition?

Mr. Crary: Attached to the moving papers on the application for a preliminary injunction. I must again point out that I have made the objection here that the Civil Service Commission is not a party. We are carrying

out a directive of the Civil Service Commission in this letter.

The Court: I am not criticizing anybody in the State for taking a position. I say that this case, just like Mr. Starbuck's position, is not to me black and white, but gray. If it were gray to me, I wouldn't feel that I have lost any of the dignity of the State by granting him a hearing, because it is not one of those things that hits in notch A or B to me.

Mr. Crary: In this letter, your Honor, the Civil Service Department wrote to the State University. In effect it said to us, "He hasn't answered this question, you have got to get him to answer it, what you should do [fol. 250] is advise him to answer yes or no, and if the answer is yes an explanation in detail is requested."

The Court: That may be pretty hard to do.

Mr. Crary: He was given a full opportunity to attach whatever explanation he wanted.

The Court: I don't know what his philosophy about it is. It may not be the kind of thing that is readily yieldable, readily fitted into a written communication, I don't know. It is not my business to know. How simple it would be, in the light of the fuzziness of Starbuck's status, and the whole University starting, getting under way here, to grant him a hearing and say, "Now, what is your problem?"

Mr. Crary: Your Honor, if I may answer that to the best of my ability; this is a procedure which has been followed by the Civil Service Department as long as the statute has been in existence. To do what your Honor [fol. 251] suggests would be, in effect, to hold that he has a constitutional right to that kind of a hearing.

The Court: You are worrying about the precedent, I say there won't be any. One of these days you are going to have the University on its feet, on all fours, it won't happen again, so that Starbuck will be one color or another. When he is hired, seventy-five will be made out that day, undoubtedly. You know what happened, this

diddling along out here, seventy-five follows up. Some day they are going to be eye to eye and Starbuck won't get off the ground.

Mr. Crary: There is a specific—

The Court: I don't mean Starbuck, all people will have this thing checked out before they get underway at all. This did not happen here.

Mr. Crary: I say to your Honor that Mr. Starbuck is welcome to make any explanation he wishes to the Civil [fol. 252] Service Commission. He was invited to do so.

The Court: Was there a hearing?

Mr. Crary: This is not a hearing in the due process, Fourteenth Amendment sense of the hearing, no, but I cannot, representing the State University in seeking to carry out a directive of the State Civil Service Department, and in the absence of the Civil Service Department as a party to this proceeding, consent to give him a hearing before the Civil Service Department. Nor do I think the Civil Service Department itself could consent to this in the absence of any provision in the statutes of the State for it, and when there is a specific protection to that person who in the course of this investigation is found ineligible to the full rights of hearing on any elements which properly interferes in that decision of ineligibility.

The Court: Well, you see my thinking. I know you have a lot of rules and regulations. In private life some- [fol. 253] times we cut through some of them and think we do good by it.

Mr. Crary: I do appreciate your Honor's thinking and for that reason I would just like to extend this discussion a moment. Take the case of the competitive class employee, who has to qualify to get permanent employment within the meaning of the statute. He can only do this through having been certified as having successfully passed a competitive examination. To take that examination he has to make an application. The application contains this exact question. He never gets to take the

examination until he satisfactorily establishes his qualifications to be examined. This form is the examination which is utilized to fill the position because at the moment it cannot be filled by competitive procedure.

The Court: I understand that.

Mr. Crary: This is the application for a position, it [fol. 254] says so.

The Court: I understand that. If that form 75 had been executed before Mr. Starbuck took off in his job, before he became settled and the community began to know him as a librarian out there, I think he would have nothing. The thing that bothers me, in the philosophy of the case law, is that here is a man who if he is dropped out because of his failure to answer Question No. 7 results in a stigma in the neighborhood, at least in some people's minds. I would like to, if I could accomplish it, give him a chance to go before an organization that is set up to hear, give him a hearing as to why. Then if they give him a hearing and they don't like what they hear, he is finished.

Mr. Crary: He was already invited to explain. Had he explained and his explanation been satisfactory, he would not be dropped. If his explanation was not satis- [fol. 255] factory, and he was held ineligible, he has the fullest kind of a hearing that the law allows.

The Court: The law distinguishes that explanation, as you put it, and the hearing, because if the law contemplated that an explanation was enough they would not have provisions for a hearing.

Mr. Crary: This is an inquiry, an investigation by an administrative body; it is not a judicial hearing, true. It is an inquiry. He refuses to cooperate, it is as simple as that. I think we can cite to you cases which very clearly hold that where that kind of an obstruction to a legitimate inquiry is interposed by an applicant for a position or an employee, he may be dismissed on that ground; not because he is a subversive, but because he refuses to cooperate in a lawful inquiry. That the inquiry is lawful is conceded.

Mr. Lipsitz: In Askor vs. Little the court said—which [fol. 256] required the signing of a particular oath—"the man cannot be discharged unless he has a hearing first."

Mr. Crary: The statute does not require a disclaimer.

Mr. Lipsitz: That is right, they insist they have a right to discharge him without a hearing.

The Court: Again, I don't want to take this time. If somebody had the power to give this hearing—and I am not criticizing you, I know how tight these things are, you don't deal with the State of New York like you deal with some corporate entity where the president says, "We will go along in an effort to get this thing resolved." I know that, but I thought I would throw it out, it would solve many things.

Mr. Crary: I hope your Honor understands my position with the Civil Service Commission, which I don't represent, which is not a party to the case, so that I am not in [fol. 257] a position—I am greatly concerned, your Honor, I don't want to conceal it from the Court, I want to be honest about it, I am greatly concerned about what happens tomorrow, which is April 1st, when the Comptroller of the State of New York, who also is not a party to the case, will refuse to issue any more paychecks without action on our part.

The Court: I have thought of that before. I have run into comptrollers before. I know that is true, that is not my problem. I am trying to conclude this hearing, and I am trying to give it the best effort I have. We will have to discuss tomorrow after we finish with the evidence.

Mr. Lipsitz: Shall I proceed?

The Court: Yes.

Direct examination.

By Mr. Lipsitz:

Q. Mr. Starbuck, you are presently employed at the State University of New York at Buffalo in the library, is [fol. 258] that correct?

A. Yes.

Q. And during the month of February, 1964—I am leading, I want to shorten this up—you were advised that unless you answered Question 7 on that form that procedures would be taken to terminate your employment?

A. Yes.

Q. At which point this proceeding was instituted to attempt to restrain that separation?

A. Yes.

Q. Going back to the time that you were considering coming here to work; did you make any other inquiries from other employers as to the availability of work at or about the same time that you inquired from Dr. Silverman?

A. Yes, I was writing from Rome to people in New York City and elsewhere.

Q. What time did you return to the United States from Rome?

A. September 13th I think we got into New York.

Q. At that time, or at least at or about the time, before you had your conversation with Dr. Silverman, did you receive any other offers of employment?

A. Yes.

[fol. 259] Q. Can you recall the offers?

A. Just the week before I finally decided to take the University of Buffalo job I was offered a job at Random House, in the editorial trade, editorial department in New York.

Q. In what capacity?

A. As an editor.

Q. At what salary?

A. $7500.

Q. Did you receive any other offers of employment?

A. There was some. I was interviewed about other jobs, there was offers. It never got as far as discussing salary; Harper and Roe, another publisher.

Q. Did there come a time in September when you came to Buffalo and discussed employment with Dr. Silverman?

A. That is correct.

Q. You heard him testify as to the conversation?

A. Yes.

Q. That he had with you, the conversation he had with you?

A. Yes.

Q. Did he substantially state the agreement that he offered to extend to you for employment?

A. Yes. There were a few minor things mentioned but—

Q. Tell us what else was said that you recall that he [fol. 260] did not testify about?

A. Well—

Q. In terms of the employment that he offered?

A. Well, I spoke with him at the time about the possibility of taking an extra course later on to teach in the University, and we agreed that that was alright, that would be possible.

Q. There was no offering you of employment other than in the library?

A. No, it was a library job. There were a few things I had to know, I had to bring my familiarity up.

Q. Were you told as to how long you could expect to be employed?

A. Well, we were talking about a year's contract. I know I did say I wanted to be sure it would be that before I came up. He said, "I presume—" I couldn't quote his words—he said, as a general manner, "I presume we will get along, this will continue from year to year." Indeed, we spoke in general terms about possibilities later for advancement.

Q. Now, other than his interview with you, during which this offer was made and your agreement to accept it, was anything told you about any other requirements to become employed here at the library at the University?

[fol. 261] A. No.

Q. Alright, did you move your family to Buffalo?

A. Yes.

Q. Consisting of what, a wife and—

A. A wife and child.

Q. Did there come a time that you commenced performing your duties at the library?

A. The first of October.

Q. And do you know when it was that you were first paid?

A. There is a normal delay, it seems to me it was about six weeks. I can't remember exactly, but I could look back and find out.

Q. When you were paid, were you finally paid for all your term of employment?

A. Yes.

Q. Did there come a time at the end of October, or whenever it was, that you were confronted with Question 7, Form P-75?

A. Yes.

Q. When was the first time you were confronted with that?

A. I don't remember. It was after I started to work. I was called over there and given forms.

[fol. 262] Q. Place it in, as nearly as you can, the month of October?

A. As I remember, it was several weeks after I started to work.

Q. Is that the first time that you learned about any such requirement?

A. Yes.

Q. Did anybody talk to you about taking an examination before that?

A. No, nor at that time I never heard of the examination thing until after this affidavit of Mr. Randall's.

Q. When you were given that form, I take it that you came to Question 7, you placed a notation on it that appears on the document that has been submitted with Mr. Randall's affidavit?

A. Yes.

Q. Now, had you been advised before that time that you would have to answer that question in that form would you have taken the employment at the University?

A. No.

Q. Were you in the United States Armed Forces during the Korean war?

A. Yes.

Q. Were you honorably discharged?

A. Yes.

[fol. 263] Q. Where was the last place that you voted before 1963?

A. Massachusetts, Boston.

Q. Is that the state from which you left to go abroad?

A. That is right.

Q. Mr. Starbuck, if your employment at the University ceased what other source of income will you have at that time?

A. Well, I might have my lectureship in Millard Fillmore, which would last through June.

Q. That is at the rate of $400 for the term?

A. Yes, of which I have received $200. I will receive an increment of $200.

Q. What other source of income?

A. Royalties from publications.

Q. What do they amount to?

A. A little under $200 last year.

Q. Poetry isn't sold that widely, is that it?

A. I might make a killing, but—

Mr. Lipsitz: I have no further questions.

Cross examination.

By Mr. Crary:

Q. Mr. Starbuck, when you came to work at the State University of New York at Buffalo, did you know this was employment by the State of New York?

A. Yes, I did, by the time I started to work. I had [fol. 264] addressed my first letter to the University of Buffalo, then Dr. Silverman told me about the merger.

Q. Attached to your moving papers in this matter is Exhibit P-3A, a copy of a letter bearing the date December 13th, purporting to be addressed to you and signed Harry W. Poppey; did you receive that letter?

A. It seems to me I received it. Yes, this is a copy of the letter I received. Exhibit 4 is my reply.

Q. Now, in response to that letter, which says that you should be advised to answer this Question 7 either yes or no, and if the answer is yes an explanation in detail is—

A. Would you read the letter in its own language, please?

Q. You may read it yourself.

A. Well, you were paraphrasing it.

Q. "Dear Mr. Starbuck: Because you did not answer Question 7 on the back of Form PR-75, the Department of Civil Service has written to the State University Central Administration as follows: 'You should be advised to answer this question either yes or no. If the answer is yes, an explanation in detail is requested.'" I will not read the rest of it unless you wish me to. I would ask you, did [fol. 265] you answer the question yes or no?

A. No, I did not. May I—

Q. I asked you did you answer it and since you did not answer it either yes or no, you did not submit any explanation in detail as requested in this letter?

A. I was only requested for an explanation if I answered yes.

Q. You did not submit any explanation in detail as requested in this letter, yes or no?

A. I did not answer yes or no. I sent a letter.

Q. Please, yes or no, did you submit an explanation in detail?

A. I submitted some explanations in my letter in response.

Q. But not an affirmative answer to the question?

A. No.

Q. One other question—may I have that PR-75 form? If your Honor please, your Honor has the exhibit I am looking for. I woud like to base my last question on the PR-75. Mr. Starbuck, this copy of the PR-75 form, which has been put in evidence, as a copy of a form which purports to bear your signature. You did sign that form, did you not?

A. Yes, sir.

Q. And you did say in answer to the question, "How long have you continuously been a legal resident of New York [fol. 266] State"; "One month"?

A. Yes.

Q. You did put the figure one in answer to that question?

A. Yes.

Mr. Crary: That is all, your Honor.

The Court: Let me ask you a question, Mr. Starbuck. I want you to think about it, I don't want you to answer it at all because I am not trying to pry any answer out of you as to Number 7. And if you have any question at all about answering me, and therefore about answering Number 7, against your scruples, whatever they may be, all you have to do is say so.

In your letter, Exhibit 4, the third paragraph on page one you say: "I can't by that very reason submit without question or protest to a procedure which seems on the face of it designed to put prior restraint in a way susceptible to stressing general interpretation and application upon that free interchange and competition of ideas which any university should and any American university [fol. 267] must promote and defend."

You have heard me talking about that question before, teach or advocate. In your analysis of that question have you read it with a view of either answering it or not; did you take that teach to be, in other words, if a person taught the ideology so there would be a free interchange

of ideas, did you feel that might be something that was a taboo in Question 7? Don't answer me if you don't want to. What I am trying to say, when you read that the first time—it seems to me that to teach or advocate are two different things, and I wanted to know whether there was reluctance on your part to answer that question perhaps because you had a similar interpretation of it. If you don't want to answer that at all, say so. I absolutely defend your right to not answer that in this courtroom if you do [fol. 268] not please. Would you rather not?

The Witness: Well—

The Court: I am only interested in whether your reaction was that teaching or comparing it to other ideologies might be contrary to the State policies?

The Witness: In that respect, that word and certain other words in there seemed—well, I don't know whether we want to get into the question—it seemed to be susceptible to interpretation. My understanding of recent American history, these things have been used under interpretations which might raise a constitutional question, which might be used in restraint of discussion which had nothing to do with this specific subversion. I have represented in the explanation that I think these are questions that are, to someone who's never seen this before and hadn't lived under the laws of the State of New York and didn't know anything of the background of this thing, [fol. 269] just these words on the page, that seemed important, puzzling and possibly distressing. I could not be sure how they were to be interpreted, what the legislative history of this might be.

The Court: Well, as I understand what you are saying, you would have difficulty, having made a minute analysis of the question, in answering it yes or no with all complete honesty and frankness because you say, in your opinion, some of the wordings might involve interpretations, subsequently if you learned of that interpretation, you would have made another answer. You did not read

the common ordinary thought into that question? You went into it more in detail in making your own analysis of whether you could answer it or not?

The Witness: Yes. I did not—it was not an occasion where I could even do that. At the time I did think [fol. 270] the history of things which had been done in communities in this country from time to time under the banner of anti-subversive action, and things which have often later been repudiated in the courts, and disavowed by the American people, and I knew many questions like this had been enacted into law, some of them after a good deal of debate, some have been upheld, some not been. I feel that with the fact that it is on the form, it has this effect, an inquiry about it is enough to cause some summary dismissal, and indicates it is considered to be important. Certainly, this is an important issue in American life. I hesitate to go on here, we are talking about procedure.

The Court: I understand that. What I wanted to know was, you did not just take that as a question, were you a member or not of some subversive organization. Your analysis was a much more refined one, as I view it, where- [fol. 271] in you went back to history in the country and other developments?

The Witness: Yes, sir.

The Court: You did not just take this as a yes or no to are you or were you ever a member sort of thing?

The Witness: No, sir. For all I know, among other things, I find later that there is a list of two organizations in the State of New York, and I know other such formulas turned out to refer to lists of thousands of organizations. May I say, I have been accused, it has been suggested I am being uncooperative in—have been uncooperative in furthering the investigation into my competency and reliability as a librarian, as a teacher, as a purchasing officer. I would hesitate to testify to my own competency in any of these positions if I put my name to something without examining it.

The Court: Any more questions?

Mr. Lipsitz: None.

[fol. 272] Mr. Crary: None.

Mr. Lipsitz: We have no more testimony.

The Court: Thank you, that is all, Mr. Starbuck. That is the end of the evidence in the case?

Mr. Crary: If the Court please, Mr. Randall is here, and the only thing that I would want to put him on the stand for would be to introduce some letters, correspondence, from the Civil Service Department which have a bearing on the question of the Civil Service determination as to the classification or unclassified character of the librarian position. I would be willing, if counsel is agreeable, after examining them, to put them in evidence without putting Mr. Randall on the stand for a lengthy examination. I would be willing that counsel should make whatever cross examination he pleases.

Mr. Lipsitz: Let me look at the letters.

Mr. Crary: The letters are copies, they are not originals.

[fol. 273] Mr. Lipsitz: I have another supplemental memorandum for you and Mr. Crary.

Mr. Crary: If the Court please, I would like to also make clear on the record at this point, in offering testimony on behalf of the defendants, I, before doing so, renew our motions to dismiss on all the grounds stated.

The Court: Yes.

Mr. Lipsitz: I have no objection to these being offered, as far as their authenticity is concerned. I don't know about the contents to argue about their pertinency.

Mr. Crary: If the Court please, Mr. Randall prepared an affidavit which is here, he is available for any questions which the Court might wish to address to him or that counsel might wish to put by way of cross examination. Barring that, I see no need of putting him on the stand.

The Court: I don't have any questions that I haven't asked you. I guess you know all the answers that Mr.

[fol. 274] Randall would, particularly those matters I asked you about, the various statutes.

Mr. Crary: He could verify the procedures that I have given your Honor.

The Court: Let's assume if he hasn't corrected you, what you said is right.

Gentlemen, that is the end of the proof here. I want to sit down with you and talk over the next move. I have been handed a supplemental brief here, which I suppose you just got a copy of. Have you given me the State's brief?

Mr. Crary: I haven't. As soon as we get back to Albany we will complete the one we have in preparation.

The Court: Let's go into chambers and talk about the time element, and so forth. We will recess at this time.

Mr. Tiffany: The Board of Regents makes a motion to dismiss.

(Thereupon the court was in recess.)

[fol. 275]

PLAINTIFF'S EXHIBIT 1

(Letterhead of State University of New York at Buffalo, Buffalo 14, New York)

February 4, 1964

MEMORANDUM

TO: Dr. Thomas E. Connolly

FROM: Jeannette F. Martin

With reference to our telephone conversation of today, I am enclosing a list of the Faculty Without Rank or Tenure and an excerpt from the Ordinances and Charter Article XII, Section 3.

(2) enclosures

[fol. 276] FROM

Ordinances and Charter of the University of Buffalo
1958

ARTICLE XII

THE FACULTY

SECTION 3. The Faculty of the University shall consist of all persons who are members of the faculty of any of the Schools or Colleges or Divisions of the University. The Faculty of the University shall also include persons who are members of the professional staffs of the University libraries, of the offices of student personnel and health services, of research institutes, and of other units of the University which may be designated by the Chancellor and approved by the Committee on General Administration of the University, and who are recommended for appointment to the Faculty of the University by the Chancellor and approved by the Committee on General Administration. Persons so appointed shall be designated members of the Faculty of the University without rank or tenure as such.

[fol. 277]

October 21, 1963

THE FACULTY OF THE STATE UNIVERSITY OF NEW YORK AT BUFFALO

(Without Rank or Tenure)

Dr. Dorothy B. Adema	—	Chief Counselor for Women
Mr. Hugh Craig Atkinson	—	Reference Librarian
Miss Ruth Bartholomew	—	Gift Exchange Librarian
Miss Mildred Blake	—	Assistant Director of Student Personnel
Mrs. Priscilla M. Bommer	—	Jr. Assistant Readers' Service
Miss Marilyn M. Boucher	—	Assistant Supervisor of Women's Housing
Miss Ida M. Cheplowitz	—	Science Librarian
Mrs. Virginia K. Church	—	Sr. Assistant Cataloger
Mrs. Nina T. Cohen	—	Acquisitions Librarian
Mr. James Connell	—	Assistant Supervisor of Men's Housing
Miss Helen Davidson	—	Subject Specialist in Book Selection
Mr. Milutin Devrnja	—	Sr. Assistant Catalog Librarian
Mr. Gene L. Dewey	—	Sr. Assistant Readers' Service
Mr. Edward F. Ellis	—	Subject Specialist in Book Selection
Mr. William B. Ernst, Jr.	—	Associate Director of Library
~~Mr. Robert M. Gorman~~ *resigned 1/31/64 D. 1/15/64*	—	Assistant Director of Placement Services
*Mr. Roger W. Gratwick	—	Dean of Men

* By virtue of their office, they are members of the University Senate.

The Faculty of the State University of New York at Buffalo (Without Rank or Tenure) October 21, 1963

Miss Dorothy M. Haas	—	Director of Norton Hall
Miss Helen G. Haberman	—	Librarian—Subject Specialist
Mr. Thomas F. Haenle	—	Assistant Director of Norton Hall
Mr. Robert P. Haro	—	Subject Specialist—Acquisitions
Miss Miriam Hawkins	—	Librarian
Mr. John P. Herling	—	Asst. Director for Readers' Services
Mr. David B. Hershenson	—	Counselor—Student Personnel
Miss Ann Hicks	—	Assistant Coordinator of Stud. Activities

[fol. 278]

Mr. Andrew W. Holt	—	Assistant to Dean of Millard Fill. College
Miss Margaret Y. Johnston	—	Catalog Librarian
Miss Dorothy J. Keller	—	Supervisor of Women's Housing
Dr. Nicholas Kish, Jr.	—	Asst. Dean of Millard Fillmore College
Mr. C. James Lafkiotes	—	Director of Placement Student
Mrs. Aniela Lichtenstein	—	Cataloger, H.S. Library
Mrs. June Lih	—	Cataloger
Miss Roberta Lindo	—	Head Resident (Goodyear Hall East)—Women's Housing
Mrs. Alicia Livingstone	—	Subject Specialist—Book Selection
Patricia C. Lowenberg	—	Assistant Librarian, Lockwood Library
Helen H. Lyman	—	Librarian, Lockwood Library

The Faculty of the State University of New York at Buffalo (Without Rank or Tenure) October 21, 1963

Miss Ellen M. Mack	—	Sr. Assistant Readers' Services
Mr. Clark M. Maloney	—	Asst. Supervisor—Housing and Food
Miss Katherine L. Maloney	—	Assistant in Readers' Services
Miss Mary C. Mc Carthy	—	Circulation Librarian
Mr. Donald T. Mc Clain	—	Assistant Director of Housing
Mr. Theodore E. Miller	—	Counselor—Student Personnel Services
Mrs. Faith K. Moll	—	
Mrs. Joan R. Moos	—	Asst. to Dean of Students—Stud. Personnel
Mrs. Natalie Morton	—	Counselor—Stud. Personnel Services
Mr. Thomas B. Nickson	—	Asst. Dean of Millard Fillmore College
Mr. John Z. Okoniewski	—	Director of Housing and Food
Mrs. Charlotte F. Opler	—	Vocational Librarian—Stud. Pers. Services
Mr. Philip E. Pepper	—	Jr. Assistant of Readers' Services
Mrs. Esther A. Rogers	—	Engineering Librarian
Miss Anna Russell	—	Sr. Assistant in Poetry Collection
Miss Jacqueline Saab	—	Reference Librarian
[fol. 279]		
*Miss Jeannette Scudder	—	Dean of Women
Mr. William H. Siemering	—	Asst. Coordinator of Student Activities

* By virtue of their office, they are members of the University Senate.

The Faculty of the State University of New York at Buffalo (Without Rank or Tenure) October 21, 1963

Miss Dorothy K. Simon	—	Counselor—Student Personnel Services
Mr. Larry Smith	—	Assistant to Dean of Students
Mr. George E. Starbuck	—	Assistant in Acquisitions
Mrs. Ivah R. Sweeney	—	Asst. to Director and Order Librarian
Mr. George G. Thompson	—	Asst. to Dean of Millard Fillmore College
Miss Virginia B. Thweatt	—	Assistant Reference Librarian
Mr. Robert J. Watson	—	Sr. Assistant Readers' Services
Mr. John Warren	—	Coordinator of Scheduling
Mr. Richard I. Wilson	—	Assistant Coordinator of Stud. Activities
Miss Cindy E. Woodruff	—	Cataloger—Lockwood Memorial Library

Birth Date June 15, 1931

Check One:
- [X] Faculty
- [ ] Non Faculty
- [ ] U.B. Student

STATE UNIVERSITY OF NEW YORK AT BUFFALO
BUFFALO 14, NEW YORK

To the Chancellor of the University:

I recommend * the appointment of

Name Mr. George E. Starbuck
(Mr./Miss) First Middle Last

Address c/o New Yorker 25 W. 43 street New York 36, New York

as (title)† Assistant in Acquisitions N.S.

Department Lockwood Memorial Library College, School or Division

Proposed salary (1) Annual $ 6480 (2) If for term, amount for term, $

(3) If part-time, at the rate of, $; total amount needed $

TERMS OF APPOINTMENT (Check one item in each column below):

[X] Full-Time	[ ] Academic Year	[ ] New Position	[X] New Employee
[ ] Part-Time	[X] 12 Months Year	[X] Replacement ‡	[ ] Previously on staff §
[ ] Part Salary		[ ] Promotion	
[ ] Without Pay		[ ] Reappointment	

This appointment covers ____ % of full-time appointment.

To become effective October 1, 1963, To expire continuing, 19__

Budget item No. 14 1437 If a transfer of funds is required it should come from Item No.

Additional Information Mr. Starbuck replaces Mrs. Hallowitz, who is now working part-time. The amount budgeted for this line is 6980; recommended salary for Mr. Starbuck is $6480.

Signed O. A. Silverman (Dean or Director) Approved by Albany Sept 1963 Date September 23, 1963

Approved by (Central Administration)

P + S

Date: Authorization by Council Date

Notification Letter sent Date

Deans, Directors, and others concerned are requested to fill out the form in six copies for all recommended staff changes and forward five copies to the Vice Chancellor for Educational Affairs, who, after appropriate investigation, will forward recommendation to the Chancellor. When approved, form No. 4 will be returned to the Dean (or Director) who originated the request.

*Insert appropriate wording:

(1) the appointment of
(2) the reappointment of
(3) the promotion of
(4) leave of absence for (state purpose)
(5) change in salary for (be sure to show present salary and distribution as to Depts. or Funds)
(6) acceptance of the resignation of
(7) removal of name from payroll (state reason)
(8) change in distribution of salary as to Depts. or Funds
(9) change in title of

† Give title exactly as it should appear in notification letter, catalogs, and directory.
‡ Give name of predecessor. Use line marked "Additional Information."
§ Give approximate date and state in what capacity. Use line marked "Additional Information."

(In the case of new appointments, two copies of the biographical data form should accompany the recommendation.)

H. T. MOEL
OFFICIAL REPORTER
U. S. DISTRICT COURT

[fol. 280]

PLAINTIFF'S EXHIBIT 2

[fol. 281]

PLAINTIFF'S EXHIBIT 3

Department of Audit and Control
Department of Civil Service

Follow Detailed Instructions in Making Entries on This Form

PAYROLL AND PERSONNEL TRANSACTION FORM PR-75

FOR USE OF DEPARTMENT OF AUDIT & CONTROL ONLY

01	GROSS & ANNUAL	34	RELEASE - TERMINATION	AGENCY CONTROL NUMBER	1677
01	GROSS	31	RELEASE - TRANSFER		
01	ANNUAL (38-47)	32	RELEASE - TEMPORARY		
01	GR. & ANN. X75 (NAME 11-25/48-62)	33	TITLE (GR 26-37/TITLE 48-62)	GROUP	1 ☒ 2 ☐
49	LINE CHANGE (NEW 26-37)	S	SUMMARY		
35	NAME CHANGE (NEW 48-62)	ST	SUMM. TRANSFER		

1	DEPT. [illegible]	DIVISION 37	PAYROLL AGENCY State Univ. of New York at Buffalo				BUREAU University of Buffalo		
2	LINE NUMBER 19573	0	3 NAME	FIRST NAME George	MIDDLE NAME E	LAST NAME Starbuck			
4	LINE NUMBER CHANGED TO		5 NAME CHANGED TO	FIRST NAME	MIDDLE NAME	LAST NAME			
6	GROSS SALARY (ADD)	(COLS. 26-37) 775 80	ANNUAL SALARY (COLS. 38-47) 6480 00	(BASE SALARY)	(ADJUSTMENT)	10-MOS. SAL.-X75 (COLS. 38-47)			
7	PREV. PERIOD GROSS SALARY (DEDUCT)	(COLS. 26-37)	8 GRADE (COLS. 26-37) 60	TITLE - (COLS. 48-62) Asst. in Acquisitions					
9	NAME OF STATE AGENCY WHERE LAST EMPLOYED (IF ANY)				10 DATE OF LAST CHECK				
11	GEOGRAPHIC LOCATION	Buffalo, New York	JURIS-DICTIONAL CLASS MC.	12 EFFECTIVE DATE 10/1/63					
13	APPOINTMENT FROM LIST ✓	LIST NO.	SERIAL	TITLE OF LIST	14 DURATION ☒ PERMANENT ☐ TEMPORARY				

15 NOMINATION FOR APPOINTMENT — APPLICATION ON OTHER SIDE MUST BE COMPLETED IF RULES BELOW ARE USED.

- ☐ RULE VIII — 4 — PROVISIONAL APP'T OR PROM.
- ☐ RULE VIII — 9 — EXCEPTIONAL APPOINTMENT
- ☐ RULE VIII — 10 — APP'T. WHERE EXAMINATION DOES NOT PROVIDE LIST
- ☐ RULE XIV — 4 — N. C. PROMOTION
- ☐ RULE XIX — 1 — N. C. CLASS APPOINTMENT
- ☐ OTHER RULES: STATE RULE _____ AND EXPLAIN IN REMARKS

16 TRANSFER FROM (AGENCY) _____ (WITH EMPLOYEE'S CONSENT AND THE APPROVAL OF THE AGENCY NAMED ABOVE)

17 STATUS CHANGE ☐ REINSTATEMENT ☐ DEMOTION

18 REMARKS

Addition to payroll - Effective Oct. 1, 1963

Approved by Albany, Sept., 1963

Address: 950 Lafayette Avenue
Buffalo 9, New York

P-3 FOR IDENT.
P-3 IN EVI.
H. T. NOEL
OFFICIAL REPORTER
U. S. DISTRICT COURT

19 SIGNATURE OF APPOINTING OFFICER _____ TITLE _____ DATE _____

20 THIS ITEM FOR CIVIL SERVICE USE AS REQUIRED

☒ APPROVED ON TRAINING AND/OR EXPERIENCE ☐ DISAPPROVED

pending instead.

64-3 pend C&C action

☐ WRITTEN ☐ ORAL ☐ W. W.

NO. _____ DATE _____

TITLE _____

SCORE _____ ADD SCORE _____

EXAMINER _____

ADM. DIRECTOR _____

CERTIFICATE VALID UNTIL 4-1-64 (DATE)

THIS CERTIFIES THAT THE ABOVE EMPLOYMENT IS IN ACCORDANCE WITH LAW AND RULES MADE IN PURSUANCE TO LAW, SUBJECT TO ANY LIMITATION OR CONDITION SPECIFIED ABOVE.

BY D Simmons

DATE 11/6/63

ROSTER POSTED BY	DATE	LIST POSTED BY	DATE	CERT. CARD NOTED BY	DATE	STAT. CARD NOTED BY	DATE

194

STATE UNIVERSITY OF NEW YORK
THURLOW TERRACE
ALBANY, NEW YORK

PERSONNEL OFFICE

January 24, 1964

To: Faculty Senators and Chief Administrative Officers

Re: Grievance Procedure, Academic Employees

Three and a half years having passed since the establishment and distribution of the University's grievance procedure for employees in the unclassified service, it seems appropriate to reannounce the procedure and policy, in the interests of full understanding and information.

The basic policy was established by resolution of the Faculty Senate as recorded on page 12 of the Minutes of May 9-10, 1960, as follows:

> RESOLVED that the function of the Senate with respect to matters of mutual interest to the faculties of the University be exercised, in the case of faculty grievances which cannot be satisfactorily resolved through the efforts of the committee serving that purpose at the institution concerned, by referring such matters for review, including hearing the faculty member alleging the grievance, to the Personnel Policies Committee of the Senate. If such committee cannot effect a satisfactory settlement of the grievance, a report of the matter shall be made to the full Senate which shall consider the same and make its advisory recommendation to the President.

College Faculties have latitude for local autonomy in forms of organization, per Article X, Section 5 of the Policies of the Board of Trustees. The University has encouraged the establishment, at each unit, of a committee whose function includes the consideration of faculty grievances at the local level. The University does not prescribe the specific organization and procedure for such committees, but does require that there be a procedure at each unit.

An academic employee may obtain information as to the local procedure at his or her unit through normal administrative channels at the unit, or from the chief administrative officer, or from the faculty senator.

David S. Price
Assistant Vice President

Distribution:
Each State-operated Unit (3)
Each faculty senator and alternate
(for distribution at meeting of January 27, 1964)

H. T. NOEL
OFFICIAL REPORTER
U.S. DISTRICT COURT

[fol. 282]

PLAINTIFF'S EXHIBIT 5

Birth Date _____

Check One:
☑ Faculty
☐ Non Faculty
☐ U.B. Student

STATE UNIVERSITY OF NEW YORK AT BUFFALO
BUFFALO 14, NEW YORK

TO THE CHANCELLOR OF THE UNIVERSITY:

I recommend * the appointment of

Name Mr. / Mrs. / Miss — George (First) — (Middle) — Starbuck (Last)

Address _____

as (title)† Lecturer

Department English College, School or Division UFC

Proposed salary (1) Annual $ _____ (2) If for term, amount for term, $ 400.00

(3) If part-time, at the rate of, $ _____ ; total amount needed $ _____

TERMS OF APPOINTMENT (Check one item in each column below):

☐ Full-Time	☐ Academic Year	☐ New Position	☐ New Employee
☒ Part-Time	☐ 12 Months Year	☐ Replacement ‡	☐ Previously on staff §
☐ Part Salary		☐ Promotion	
☐ Without Pay		☐ Reappointment	

This appointment covers _____ % of full-time appointment.

To become effective January 27, 19 64 To expire May 23, 19 64

Budget item No. 25 T S If a transfer of funds is required it should come from Item No. _____

Additional Information _____

Signed _____ (Dean or Director) Date February 1, 1964

Approved by _____ (Central Administration) 2-11-64

HP

Authorization by Council Date 2/12/64

Date: Notification Letter sent Date _____

Deans, Directors, and others concerned are requested to fill out the form in six copies for all recommended staff changes and forward five copies to the Vice Chancellor for Educational Affairs, who, after appropriate investigation, will forward recommendation to the Chancellor. When approved, form No. 4 will be returned to the Dean (or Director) who originated the request.

Insert appropriate wording;

(1) the appointment of
(2) the reappointment of
(3) the promotion of
(4) leave of absence for (state purpose)
(5) change in salary for (be sure to show present salary and distribution as to Depts. or Funds)
(6) acceptance of the resignation of
(7) removal of name from payroll (state reason)
(8) change in distribution of salary as to Depts. or Funds
(9) change in title of

P-L
P-C

† Give title exactly as it should appear in notification letter, catalogs, and directory.
‡ Give name of predecessor. Use line marked "Additional Information."
§ Give approximate date and state in what capacity. Use line marked "Additional Information."

(In the case of new appointments, two copies of the biographical data form should accompany the recommendation.)

4

[fol. 283]

PLAINTIFF'S EXHIBIT 6

DEPARTMENT OF AUDIT AND CONTROL
DEPARTMENT OF CIVIL SERVICE

FOLLOW DETAILED INSTRUCTIONS IN MAKING ENTRIES ON THIS FORM

PAYROLL AND PERSONNEL TRANSACTION FORM PR-75B

FOR USE OF THE DEPARTMENT OF AUDIT AND CONTROL ONLY					
	01	GROSS AND ANNUAL	34	RELEASE - TERMINATION	AGENCY CONTROL NUMBER: 825
	01	GROSS	31	RELEASE - TRANSFER	
	01	ANNUAL (38-47)	32	RELEASE - TEMPORARY	GROUP: ☐ 1 ☒ 2 ☐ 3
	01	GR. & ANN. - X78 (NAME 11-25/48-62)	33	TITLE (GR 28-37/ TITLE 48-62)	
	49	LINE CHANGE (NEW 28-37)	S	SUMMARY	
	35	NAME CHANGE (NEW 48-62)	ST	SUMMARY TRANSFER	

1	DEPT. 11	DIVISION 10	PAYROLL AGENCY: State University of New York at Buffalo						
2	LINE NUMBER: 10573	C	3 NAME	FIRST NAME: George	MIDDLE INITIAL	LAST NAME: Pentheil			
4	LINE NUMBER CHANGED TO: 10399	C	5 NAME CHANGED TO	FIRST NAME	MIDDLE INITIAL	LAST NAME			
6	GROSS SALARY (ADD)	(COLS.28-37) 447 80	7	ANNUAL SAL. (COLS. 38-47) [illegible] 00	10 MOS. SAL. X-75 (COLS. 38-47)	8	RATE (COLS. 38-47) (DAILY OR HOURLY)	9	TIME WORKED (HRS. OR DAYS)
10	PREV. PERIOD GROSS SALARY (DEDUCT)	(COLS. 28-37) 247 ½	11	GRADE (COLS. 28-37) 60	TITLE (COLS. 48-62): Asst. Acquisition				
12	NAME OF STATE AGENCY WHERE LAST EMPLOYED (IF ANY)			13 DATE OF LAST CHECK: 5/23/64	14 NATURE OF ACTION (USE CODE)		15 EFFECTIVE DATE: 1/27/64		

16 REMARKS: Pay 1st half of evening division salary - 400.00 (200.) 1/27/64 - 5/23/64

Pay in line No. ✓

PD 7 ✓

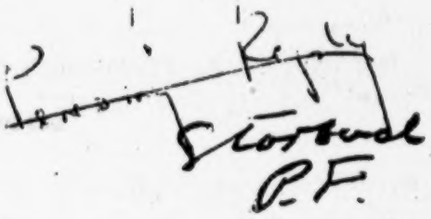
CERTIFICATE VALID UNTIL _____ (DATE)	THIS CERTIFIES THAT THE ABOVE EMPLOYMENT IS IN ACCORDANCE WITH LAW AND RULES MADE IN PURSUANCE TO LAW, SUBJECT TO ANY LIMITATION OR CONDITION SPECIFIED ABOVE.	BY _____ DATE _____
ROSTER POSTED BY _____ DATE _____		

COPY 5

[fol. 284]

PLAINTIFF'S EXHIBIT 7

Starbuck



[fol. 285]

PLAINTIFF'S EXHIBIT 8

TO: Dr. David S. Price

SUBJECT: Request for appointment

DATE: September 24, 1963

State University of New York at Buffalo requests approval to appoint Mr. George Starbuck as Assistant in Acquisition NS at an annual salary of $6480, effective October 1, 1963.

We would be able to use budget line 14,283, which was filled By Mrs. Hallowitz, who is now working on a part-time basis. Sufficient money is within our budget since $6980 was requested for this line effective July 1, 1963.

Mr. Starbuck received his A.B. from the University of Chicago in 1956, and has had one year of graduate work at Chicago and one semester at Harvard.

He has some literary credit in that he has authored Bone Thoughts (Yale Press 1960), L.P. record through the Yale series of recorded poets and a number of poems published in New Yorker, Harpers, Atlantic Monthly.

During 1961-62 he won a Guggenheim Fellow and Plix de Rome 1961-63. He has been editor of the trade department for the Houghton Mifflin Publishing Company from 1958-61.

Mr. Starbuck's experience is publishing in addition to his good educational and literary background would make him a welcome and desirable addition to the library staff.

We would hope that this position is eventually classified at the U-5 level, but in any event, we feel that at least $6480 is necessary to attract Mr. Starbuck.

approved — in Albany 10/4/63
T.S. emailed
Dey 20 emailed

HARRY W. POPPEY

HWP/jw

[fol. 286]

PLAINTIFF'S EXHIBIT 9

STATE UNIVERSITY OF NEW YORK
THURLOW TERRACE
ALBANY, NEW YORK

PERSONNEL OFFICE

October 2, 1963

To: Mr. Poppey - SUNY at Buffalo

Re: Starbuck Appointment

We have received your request to appoint Mr. George Starbuck as Assistant in Acquisition NS, at an annual salary of $6,480 effective October 1, 1963.

You indicate that this will be Item 14391. This position is presently carried on your Certificate of Approval at a salary of less than $6,480. You should therefore appoint Mr. Starbuck as an Assistant Librarian II, U-5, in unallocated temporary service. If you perfer to place Mr. Starbuck in Item 14391 you should amend your Certificate of Approval to reflect the additional salary required.

I understand that the appointment of Mrs. Hallowitz, who is now serving in this position on a part time basis, will be discontinued upon Mr. Starbuck's appointment.

Harvey Randall
Associate Personnel Administrator

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P-7

[fol. 287]

PLAINTIFF'S EXHIBIT 10

PERSONAL SERVICE

STATE UNIVERSITY OF NEW YORK AT BUFFALO

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

DIVISION University Libraries

Line #	ACCOUNT # / SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM	MONTHS
		Professional													
1	4371	O. A. Silverman	Director and Professor	NS	C I	12	$17,500		18764	464	800				
2	4372	W. B. Ernst	Associate Director	NS	C	12	13,140		13536	396					
3	4374	J. P. Herling	Assistant Director for Readers Services	NS	C	12	8,980		9304	324					
4	4375	H. C. Atkinson	Assistant Director for Technical Services	NS	C	12	8,980		9304	324					
5	4376	A. E. Sy	Curator of Special Collections	NS	C	12	8,980		9304	324					
6	4377	M. Hawkins	Health Science Librarian	NS	C	12	10,954		11,292	338					
7			Physical Science Librarian Base: 9,300 Eff. 7/1/64						6975			6975	U-15	C	12
8	4385	H. H. Lyman	Reference Librarian	NS	C	12	8,988		9292	304					
9	4380	N. T. Cohen	Acquisition Librarian	NS	C	12	8,080		8380	300					
10	4383	M. C. McCarthy	Circulation Librarian	NS	C	12	8,050		8350	300					
11	4382	M. Y. Johnston	Catalog Librarian	NS	C	12	8,080		8380	300					
12	4378	I. M. Cheplowitz	Chemistry Librarian	NS	C	12	7,260		7538	278					
13	4387	E. F. Ellis	Subject Specialist	NS	C	12	7,260		7538	278		P-10 P-10			
14	4389		Subject Specialist	NS	C	12	6,980		6980						
15	4391	G. E. Starbuck	Order Librarian	NS	C	12	6,480		6738	258					

STATE UNIVERSITY OF NEW YORK AT BUFFALO

PERSONAL SERVICE

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

DIVISION University Libraries

BUDGET ITEM #	ACCOUNT # / SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM
16	4388	H. Haberman	Subject Specialist	NS	C	12	6,980		7252	272				
17	4396	R. P. Haro	Subject Specialist	NS	C	12	7,250		7528	278				
18	4392	I. R Sweeney	Order Librarian	NS	C	12	6,470		6728	258				
19	4393	R. Bartholomew	Gift and Exchange Librarian	NS	C	12	6,480		6738	258				
20	4394	M. Devrnja	Assistant Catalog Librarian	NS	C	12	7,260		7538	278				
21	4390	V. B. Thwestt	Assistant Reference Librarian	NS	C	12	7,250		7528	278				
22	4395	V. K. Church	Cataloger	NS	C	12	5,910		6169	259				
23	4397	A. Lichtenstein	Cataloger	NS	C	12	6,480		6738	258				
24	4400	E. Mack	Assistant Reference Librarian	NS	C	12	6,480		6738	258				
25	4401	R. Watson	Assistant in Reference	NS	C	12	6,240		6492	252				
26	4402		Assistant in Reference	NS	C	12	6,470		6470	—				
27	4403	G. L. Dewey	Assistant Circulation Librarian	NS	C	12	7,260		7538	278				
28	4405	J. Saab	Reference Librarian - Health Sciences	NS	C	12	6,240		6492	252				
29	4404	E. A. Rogers	Engineering Library	NS	C	12	5,910		6169	259				

STATE UNIVERSITY OF NEW YORK AT BUFFALO

PERSONAL SERVICE

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

DIVISION University Librar

BUDGET ITEM #	ACCOUNT # / SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM
30	4406		Assistant in Reference	NS	C	12	5,910		5910	—				
31	4407	A. A. Russell	Assistant in Poetry	NS	C	12	5,910		6169	259				
32	4399	J. M. Ertavi	Assistant in Reference	NS	C	12	4,750		5910		1160			
33	4408	J. Y. Lih	Cataloger	NS	C	12	6,240		6492	252				
34	4409	C. Woodruff	Cataloger	NS	C	12	5,910		6169	259				
35	4410	P. Bommer	Cataloger	NS	C	12	5,910		6169	259				
36	4411	P. E. Pepper	Documents Librarian	NS	C	12	5,910		6169	259				
37	4416	K. Maloney	Assistant in Circulation	NS	C	12	5,910		6169	259				
38	4417	H. Davidson	Periodicals Librarian	NS	C	12	5,910		6169	259				
39		P. Lowenberg	Assistant in Reference	NS	C	12	6,480		6738	258				
40		J. Drost	Assistant in Reference	NS	C	12	5,910		6169	259				
41		S. A. Drzewieniecki	Cataloger	NS	C	12	5,910		6169	259				
42			Cataloger	NS	C	12	5,910		5910	—				
43			Reference Librarian - Health Sciences	NS	C	12	5,910		5910	—				
...	4412		Intern	NS	C	12	4,750		4500	—				
	4413	E. Krakauer	Intern	NS	C	12	4,500		5000	—	500			

STATE UNIVERSITY OF NEW YORK AT BUFFALO

PERSONAL SERVICE

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

DIVISION University Libraries

	ACCOUNT / SEG. LINE	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM	MONTHS
	4414	J. Bement	Intern	NS	C	12	4,500		5000	—	500				
	4415	J. Rynne	Intern	NS	C	12	4,500		5000	—	500				
			Assistant to the Director Base: 5,910 Eff. 1/7/64						4432.50			4432.50	SG 14	C	12
			Cataloger Base: 5,910 Eff. 1/7/64						4432.50			4432.50	SG 14	C	12
			Cataloger Base: 5,910 Eff. 1/7/64						4432.50			4432.50	SG 14	C	12
			Assistant in Acquisitions Base: 5,910 Eff. 1/7/64						4432.50			4432.50	SG 14	C	12
			Assistant in Acquisitions Base: 5,910 Eff. 1/7/64						4432.50			4432.50	SG 14	C	12
		Temporary Service	Various				56,195		96,392.50						

STATE UNIVERSITY OF NEW YORK AT BUFFALO

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

PERSONAL SERVICE

DIVISION University Librari

BUDGET ITEM #	ACCOUNT # SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM
		Non-Professional												
54	4474	M. Salatino	Secretary	SG 8	C	12	5,000		5,201	201				
55	4473	J. J. Halliday	Stenographer	SG 8	C	12	4,019		4,220	201				
56	4508	S. C. Anderson	Health Science Library Assistant	NS	C	12	4,070		4,070	—				
57	4499	P. Burns	Circulation Assistant	NS	C	12	4,070		4,070	—				
58	4500	A. H. Ryan	Chief Finance Section	NS	C	12	4,012		4,205	193				
59	4501	M. A. Brainard	Acquisition Assistant	NS	C	12	3,862		4,024	162				
60	4513	A. Ault	Supervisor Physics Library	NS	C	12	3,662		3,824	162				
61	4477	A. Rote	Chief, Reserve Room	NS	C	12	3,662		3,824	162				
62	4482	L. H. Haas	Chief, Periodical Section	NS	C	12	3,662		3,824	162				
63	4479	G. Hardy	Circulation Assistant	NS	C	12	3,260		3,422	162				
64	4478	M. Kawinski	Circulation Assistant	NS	C	12	3,422		3,584	162				
65	4480	N. B. Reeves	Circulation Assistant	NS	C	12	3,422		3,584	162				
66	4481	G. R. Hazelwood	Circulation Assistant	NS	C	12	3,422		3,584	162				
67	4485	D. Malinowski	Circulation Assistant	NS	C	12	3,422		3,584	162				
68	4486	A. L. Frank	Chief, Circulation Desk	NS	C	12	3,422		3,584	162				

STATE UNIVERSITY OF NEW YORK AT BUFFALO

PERSONAL SERVICE

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

DIVISION University Libraries

	ACCOUNT # SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM	MONTHS
	4487	K. Irr	Periodical Assistant	NS	C	12	3,422		3,584	162					
70	4488	S. Soltysiak	Circulation Assistant	NS	C	12	3,260		3,422	162					
	4489	M. Usewicz	Circulation Assistant	NS	C	12	3,422		3,584	162					
72	4490	M. Gerber	Circulation Assistant	NS	C	12	3,260		3,422	162					
73	4483	W. A. Wojciechowski	Stackman	NS	C	12	3,422		3,584	162					
	4484	N. Squitieri	Stackman	NS	C	12	3,422		3,584	162					
	4491	M. Hehr	Catalog Assistant	NS	C	12	3,422		3,584	162					
76	4492	N. Frederick	Catalog Assistant	NS	C	12	3,422		3,584	162					
	4493	M. Hillman	Chief, Card Section	NS	C	12	3,462		3,624	162					
78	4494	J. F. Anderson	Catalog Assistant	NS	C	12	3,422		3,584	162					
79	4495	W. Embree	Catalog Assistant	NS	C	12	3,422		3,584	162					
	4496	T. O'Donnell	Catalog Assistant	NS	C	12	3,260		3,422	162					
81	4497	C. D. Schick	Catalog Assistant	NS	C	12	3,422		3,584	162					
82	4498	P. D. Smith	Catalog Assistant	NS	C	12	3,422		3,584	162					
	4502	M. Van Wie	Acquisition Assistant	NS	C	12	3,422		3,584	162					
84	4503	W. Beed	Acquisition Assistant	NS	C	12	3,422		3,584	162					
85	4504	G. Wozniak	Acquisition Assistant	NS	C	12	3,422		3,584	162					

STATE UNIVERSITY OF NEW YORK AT BUFFALO

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

PERSONAL SERVICE

DIVISION University Libraries

	ACCOUNT # SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM	MONTHS
86	4505		Chief Acquisition Assistant	NS	C	12	3,260		3,260	—					
87	4506	R. Roskwitalski	Chief, Binding Section	NS	C	12	3,422		3,584	162					
88	4507	H. Merrill	Gift and Exchange Ass't	NS	C	12	3,260		3,422	162					
89	4509	D. Sheenan	Health Science Library Assistant	NS	C	12	3,260		3,422	162					
90	4510	M. Battaglia	Chief of Circulation Health Sciences	NS	C	12	3,462		3,624	162					
91	4511	R. Renna	Health Sciences Library Assistant	NS	C	12	3,422		3,584	162					
92	4512	C. Meadow	Chemistry Library Assistant	NS	C	12	3,260		3,422	162					
93	4514	F. F. Barthol	Engineering Library Assistant	NS	C	12	3,422		3,584	162					
94	4475	J. Pecora	Typist	SG 3	C	12	3,260		3,422	162					
95	4476	C. Domiano	Circulation Assistant	SG 3	C	12	3,260		3,422	162					
96	4518	G. Henderson	Acquisitions Assistant	SG 3	C	12	3,260		3,422	162					
97	4519	S. Kowaleski	Circulation Assistant	SG 3	C	12	3,260		3,422	162					
98	4516	J. Devore	Catalog Assistant	SG 3	C	12	3,422		3,584	162					
99	4521	R. E. Goatseay	Catalog Assistant	SG 3	C	12	3,260		3,422	162					
00	4522	D. Baron	Catalog Assistant	SG 3	C	12	3,260		3,422	162					
01	4523	S. Ferreri	Acquisition Assistant	SG 3	C	12	3,260		3,422	162					

STATE UNIVERSITY OF NEW YORK AT BUFFALO

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

PERSONAL SERVICE

DIVISION University Libraries

ITEM #	ACCOUNT # / SEG. LINE #	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM	MONTHS
02	4524	D. Cronwell	Acquisition Assistant	SG 3	C	12	3,260		3,422	162					
03	4525	J. Renzoni	Acquisition Assistant	SG 3	C	12	3,260		3,422	162					
04	4528	C. Lewandowski	Acquisition Assistant	SG 3	C	12	3,260		3,422	162					
05	4529	J. Williams	Gift and Exchange Assistant	SG 3	C	12	3,260		3,422	162					
06	4530		Gift and Exchange Assistant	SG 3	C	12	3,260		3,260						
07			Periodicals Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
08			Periodicals Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
09			Catalog Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
10			Catalog Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
11			Acquisition Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
12			Acquisition Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
13			Acquisition Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
14			Acquisition Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12

STATE UNIVERSITY OF NEW YORK AT BUFFALO

BUDGET PROPOSAL FOR FISCAL YEAR 1964-1965

SERVICE

DIVISION University Libraries

IT / NE	NAME	RANK AND TITLE	GRADE	TERM	MONTHS	APPROPRIATED 1963-1964	DIRECT INCOME OFFSET	1964-1965 REQUESTED	STAT-UTORY	RECLASS-IFICATIONS	NEW POSITIONS	GRADE	TERM	MONTHS
		Acquisition Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Circulation Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Circulation Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Circulation Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Circulation Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Circulation Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Poetry Room Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Engineering Library Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12
		Health Sciences Library Assistant Base: 3,260 Eff. 1/7/64						2,445			2,445	SG 3	C	12

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COURT EXHIBIT 1

TER UDI RE 2S 7 ACC 8 §2.7

2.3 Expenditures chargeable to appropriations. Expenditures chargeable to an appropriation must be for the purpose and within the fiscal year for which the appropriation is made. Vouchers in support of expenditures must clearly show that the purposes of such expenditures are those for which the appropriation chargeable therewith was made. (State Finance Law, § 43.) See Part 17 hereof for definitions of classification of expense by titles, promulgated by the Comptroller under the authority of section 52 of the State Finance Law.

2.4 Purchase or rent of automobiles and aircraft. The purchase of an automobile adapted and intended primarily for the carrying of passengers, or the rent thereof, for such purpose, for a period longer than 10 days, or the purchase or rent of aircraft, is prohibited by law (State Finance Law, § 43), unless moneys are specifically appropriated therefor. However, this provision does not apply to the necessary rental of automobiles for highway construction and maintenance, or for grade crossing elimination work.

2.5 Segregation of lump sum appropriations. Lump sum appropriations for personal service, or for maintenance and operation, or for maintenance and operation including personal service, other than such appropriations for the Legislature or judiciary, are not available for payments, except specified appropriations for temporary service or day labor, until a schedule of positions and salaries and the amounts to be available for the expenses of maintenance and operations, has been approved by the director of the budget, and a certificate of approval filed with the chairman of the Senate Finance Committee and the chairman of the Assembly Ways and Means Committee and the State Comptroller. Any such approved schedule may be amended, however, with the approval of the director of the budget and the filing of a certificate thereof with such officers above-named. (State Finance Law, § 49.)

2.6 Transfers of appropriations; certain institutions. Section 50 of the State Finance Law provides that if the sums appropriated to institutions in the Department of Mental Hygiene, the Correction Department, the Department of Health and the Department of Social Welfare are found to be insufficient at one or more institutions and more than required at other institutions, "the Commissioner of Mental Hygiene or the Commissioner of Correction, as the case may be, shall submit a schedule of positions and salaries and of amounts to be available for maintenance and operation, other than personal service, to the director of the budget, who upon approval of such schedule and the filing of a certificate of such approval with the chairman of the Senate Finance Committee, and the chairman of the Assembly Ways and Means Committee, shall file a certificate with the Department of Audit and Control which shall transfer a portion of the appropriation made for personal service from one institution to another and likewise shall transfer a portion of the appropriation for maintenance and operation from one institution to another...." The same section further provides that upon the filing of a similarly approved certificate with the Department of Audit and Control, a sum adequate for the purpose of establishing a system of community care of legally admitted patients and inmates, may be transferred to a fund for such purpose in the Department of Mental Hygiene from the money appropriated for personal service including additional compensation in lieu of maintenance and for maintenance and operation of any institution in the Department of Mental Hygiene. Similar transfers are permitted between State parks and between agricultural and technical institutes.

2.7 Interchange of items of appropriation. The amount of any item shown in a schedule, supporting an appropriation for other maintenance and operation, may be increased or decreased by interchange with other items in the same schedule, or with other items not in the same schedule but which were contained in the Comptroller's classification of items as last promulgated, with the approval of the director of the budget, filed with the Comptroller, the Senate Finance Committee and the Assembly Ways and Means Committee. (State Finance Law, § 51.)

PART 3

PERSONAL SERVICE

(Statutory authority: State Finance Law, arts. 7, 9)

Sec.		Sec.	
3.1	Personal service paid from federal moneys	3.9	Sunday and holiday services
3.2	Approval by State Civil Service Commission	3.10	Retirement system
3.3	Exceptions by Civil Service Commission	3.11	Delivery of checks to temporary and per diem employees
3.4	Payroll certificates	3.12	Standard forms prescribed
3.5	Computation of salary rate		WITHHOLDING TAX
3.6	Notification of appointments, promotions, etc.	3.51	Exemptions
3.7	Payrolls prepared by Comptroller	3.52	Monthly withholding reports
3.8	Payrolls prepared by departments	3.53	Individual tax records
		3.54	Reports to be filed by agencies
		3.55	Maintenance

Historical Note

Part repealed (§§ 3.1-3.26; 3.51-3.56), new added (§§ 3.1-3.24; 3.51-3.55), filed Mar. 5, 1962*; repealed, new added (§§ 3.1-3.12; 3.51-3.55), filed Oct. 4, 1962 to be eff. Oct. 15, 1962.

Section 3.1 Personal service paid from federal moneys. Expenditures for additional personal service, payable from federal moneys granted or allocated as part of the expense of administering a federal aid law or act of Congress must be made in accordance with schedules approved by the director of the budget. (State Finance Law, § 108.)

Historical Note

Sec. repealed, new added, filed Mar. 5, 1962; repealed, new added, filed Oct. 4, 1962 to be eff. Oct. 15, 1962. Former sec. related to biweekly payment of salaries.

3.2 Approval by State Civil Service Commission. The payment of salary or compensation to any person holding a position in the classified service is unlawful unless such person is certified by the State Civil Service Commission as lawfully employed in his position. Such certification may be made on an extended basis without time limitation or may be made for a limited period only. No further certification shall be necessary for the payment of compensation to such person so long as his status remains unchanged and during the stated limited period, if any. The Department of Civil Service shall examine the payroll of an agency at least once a year to determine that all persons listed on such payroll are employed in accordance with Civil Service Law and rules. (Civil Service Law, § 100.)

Historical Note

Sec. repealed, new added, filed Mar. 5, 1962; repealed, new added, filed Oct. 4, 1962 to be eff. Oct. 15, 1962. Former sec. related to specific appropriations for personal service.

3.3 Exceptions by Civil Service Commission. Whenever the Civil Service Commission takes exception to the name of the person appearing on a payroll, submitted for certification, the salary of such person will not be included in the payment of the payroll. However, the name of the person so eliminated may be resubmitted for certification.

Historical Note

Sec. repealed, new added, filed Mar. 5, 1962; repealed, new added, filed Oct. 4, 1962 to be eff. Oct. 15, 1962. Former sec. related to fixing of salaries not prescribed by law.

3.4 Payroll certificates. Every payroll must bear a certification signed by the head of the department concerned or by other persons to whom the authority to sign such certification has been delegated. Such delegation must be made by written direction of the head of the department, and filed in the Department of Audit and Control. The certification must state that individuals to whom payment is to be made "are employed solely in and have actually performed the proper duties

*Resolution filed March 5, 1962 was not published in the Official Compilation.

Department of Audit and Control
Department of Civil Service

Making Entries on This Form

PAYROLL AND PERSONNEL TRANSACTION FORM PR-75

FOR USE OF DEPARTMENT OF AUDIT & CONTROL ONLY					
	01	GROSS & ANNUAL	34	RELEASE - TERMINATION	AGENCY CONTROL NUMBER: 1677
	01	GROSS	31	RELEASE - TRANSFER	
	01	ANNUAL (38-47)	32	RELEASE - TEMPORARY	
	01	GR. & ANN. X75 (NAME 11-25/48-62)	33	TITLE (GR 26-37/TITLE 48-62)	GROUP: ✓ [X] 1 [ ] 2
	49	LINE CHANGE (NEW 26-37)	S	SUMMARY	
	35	NAME CHANGE (NEW 48-62)	ST	SUMM. TRANSFER	

1	DEPT. 11	DIVISION 39	PAYROLL AGENCY: State Univ. of New York at Buffalo				BUREAU: University of Buffalo		
2	LINE NUMBER: 19573	0	3 NAME	FIRST NAME: George		MIDDLE NAME: E.	LAST NAME: Starbuck		
4	LINE NUMBER CHANGED TO		5 NAME CHANGED TO	FIRST NAME		MIDDLE NAME	LAST NAME		
6	GROSS SALARY (ADD)	(COLS. 26-37) 778	80	ANNUAL SALARY (COLS. 38-47) 6480	00	(BASE SALARY)	(ADJUSTMENT)	10-MOS. SAL. X75 (COLS. 38-47)	
7	PREV. PERIOD GROSS SALARY (DEDUCT)	(COLS. 26-37)		8 GRADE (COLS. 26-37) 60 ✓		TITLE - (COLS. 48-62) Ass't. in Acquisitions			
9	NAME OF STATE AGENCY WHERE LAST EMPLOYED (IF ANY)					10 DATE OF LAST CHECK			
11	GEOGRAPHIC LOCATION: Buffalo, New York			JURISDICTIONAL CLASS: NC ✓		12 EFFECTIVE DATE: 10/1/63			
13	APPOINTMENT FROM LIST ✓	LIST NO.	SERIAL	TITLE OF LIST		14 DURATION ✓ [X] PERMANENT [ ] TEMPORARY			

15 NOMINATION FOR APPOINTMENT — APPLICATION ON OTHER SIDE MUST BE COMPLETED IF RULES BELOW ARE USED.

- [ ] RULE VIII — 4 — PROVISIONAL APP'T OR PROM.
- [ ] RULE VIII — 9 — EXCEPTIONAL APPOINTMENT
- [ ] RULE VIII — 10 — APP'T. WHERE EXAMINATION DOES NOT PROVIDE LIST
- [ ] RULE XIV — 4 — N. C. PROMOTION
- [ ] RULE XIX — 1 — N. C. CLASS APPOINTMENT.
- [ ] OTHER RULES: STATE RULE _____ AND EXPLAIN IN REMARKS

16 TRANSFER FROM (AGENCY) _____ (WITH EMPLOYEE'S CONSENT AND THE APPROVAL OF THE AGENCY NAMED ABOVE)

17 STATUS CHANGE [ ] REINSTATEMENT [ ] DEMOTION

18 REMARKS

Addition to payroll - Effeative Oct. 1, 1963

Approved by Albany, Sept., 1963

ADDRESS: 958 Lafayette Avenue
Buffalo 9, New York

19 SIGNATURE OF APPOINTING OFFICER: ✓ TITLE: _____ DATE: _____

20 THIS ITEM FOR CIVIL SERVICE USE AS REQUIRED

- [✓] APPROVED ON TRAINING AND/OR EXPERIENCE
- [ ] DISAPPROVED

Pending list.

64-3 Pend. C & C action

- [ ] WRITTEN [ ] ORAL [ ] W. W.

NO. _____ DATE _____

TITLE _____

SCORE _____ ADD SCORE _____

EXAMINER _____

ADM. DIRECTOR _____

CERTIFICATE VALID UNTIL 4-1-64 (DATE)

THIS CERTIFIES THAT THE ABOVE EMPLOYMENT IS IN ACCORDANCE WITH LAW AND RULES MADE IN PURSUANCE TO LAW, SUBJECT TO ANY LIMITATION OR CONDITION SPECIFIED ABOVE

BY ✓ D. Simmons

DATE 4/6/64

ROSTER POSTED BY / DATE	LIST POSTED BY / DATE	CERT. CARD NOTED BY / DATE	STAT CARD NOTED BY / DATE
[illegible]			

D-1

[fol. 298] DEFENDANTS' EXHIBIT D-1

[fol. 299]

NOMINEE MUST COMPLETE THIS SIDE OF FORM . . . PRINT IN INK ANSWERS TO ALL QUESTIONS.

1. LAST NAME: Starbuck | FIRST NAME: George | INITIAL: E

2. ADDRESS NUMBER AND STREET: 958 Lafayette Ave.
CITY, TOWN OR VILLAGE: Buffalo 9 | STATE: N.Y.

3. HOW LONG HAVE YOU CONTINUOUSLY BEEN A LEGAL RESIDENT OF NEW YORK STATE? YEARS: | MONTHS: 1 — YOUR COUNTY? YEARS: | MONTHS: 1

4. ARE YOU A CITIZEN OF THE UNITED STATES? Yes ☑ No ☐
If yes, check one of the following: ☑ BY BIRTH ☐ BY NATURALIZATION

5A. NEW YORK LAW AGAINST DISCRIMINATION PROHIBITS DISCRIMINATION BECAUSE OF AGE.
DATE OF BIRTH: Month: June | Day: 15 | Year: 1931
5B. HEIGHT: 6 Ft. 3 In. | 5C. WEIGHT: 180 Lbs.
5D. SOCIAL SECURITY NUMBER: 546-40-1223

6. HAVE YOU EVER BEFORE FILED AN APPLICATION WITH THE STATE DEPARTMENT OF CIVIL SERVICE? IF "YES," GIVE TITLE OF POSITION, DATE FILED, AND RESULT OF ANY EXAMINATION UNDER "REMARKS." Yes ☐ No ☑

7. HAVE YOU EVER ADVISED OR TAUGHT OR WERE YOU EVER A MEMBER OF ANY SOCIETY OR GROUP OF PERSONS WHICH TAUGHT OR ADVOCATED THE DOCTRINE THAT THE GOVERNMENT OF THE UNITED STATES OR OF ANY POLITICAL SUBDIVISIONS THEREOF SHOULD BE OVERTHROWN OR OVERTURNED BY FORCE, VIOLENCE OR ANY UNLAWFUL MEANS? Yes ☐ No ☐ I prefer not to answer at least until the necessity and relevance of this question is properly explained to me. GS

8. HAVE YOU ANY PHYSICAL DEFECT OR DISEASE OR DISABILITY OR WAR-INCURRED DISABILITY? IF "YES" DESCRIBE ACCURATELY UNDER "REMARKS." Yes ☐ No ☑

9. HAVE YOU EVER HAD EPILEPSY OR ANY MENTAL OR NERVOUS AILMENT OR BEEN A PATIENT IN AN INSTITUTION FOR THE TREATMENT OF SUCH AILMENTS? Yes ☐ No ☑

10. WERE YOU EVER DISMISSED FROM ANY GOVERNMENT EMPLOYMENT FOR REASONS OTHER THAN LACK OF WORK OR FUNDS? IF "YES," EXPLAIN UNDER "REMARKS." Yes ☐ No ☑

11. EXCEPT FOR MINOR TRAFFIC VIOLATIONS:
(a) WERE YOU EVER ARRESTED FOR ANY VIOLATION OF LAW? (a) Yes ☐ No ☑
(b) WERE YOU EVER INDICTED FOR ANY VIOLATION OF LAW OR HAVE YOU EVER BEEN A DEFENDANT IN A CRIMINAL PROCEEDING? (b) Yes ☐ No ☑
(c) WERE YOU EVER CONVICTED OF ANY VIOLATION OF LAW? (c) Yes ☐ No ☑
IF "YES," GIVE PARTICULARS AND DISPOSITION OF EACH CHARGE UNDER REMARKS.

12. IF A LICENSE OR CERTIFICATE IS REQUIRED FOR THIS POSITION, FILL IN BELOW.
NAME OF TRADE OR PROFESSION.
LICENSE ISSUED BY: | CITY OR STATE OF:
LICENSE NUMBER | LICENSED (FROM — TO)
IF NOT YET ACQUIRED, STATE DATE OF APPLICATION:

13. EDUCATION

	NAME OF SCHOOL AND LOCATION	ATTENDED FROM — TO Mo. Year	Mo. Year	NUMBERS OF YEARS CREDITED	DID YOU GRADUATE	MAJOR SUBJECT	COLLEGE CREDITS	DEGREE REC'D
ELEMENTARY SCHOOL	Chadwick School Palos Hills, Cal.	Sep 1941						
HIGH SCHOOL *			June 1947	6	yes			
COLLEGE, UNIVERSITY, OR TECHNICAL SCHOOL	Calif. Institute of Technology, Pasadena	Sep 1947	Mar 1949	1 3/4	no	Mathematics	no	
	U. of Chicago	Sep 1954	June 1957	3	yes	English		B.A. (Modern Lang.)
OTHER SCHOOLS OR SPECIAL COURSES	U. of Calif.	Sep 1950	Feb 1951	1/2	no	English		
	Harvard U.	Sep 1957	Feb 1958	1/2	no	English		

* IF YOU HAVE A NEW YORK STATE HIGH SCHOOL EQUIVALENCY DIPLOMA, GIVE NUMBER AND YEAR ISSUED:

14. EXPERIENCE

NAME, ADDRESS AND BUSINESS OF EMPLOYER	MONTHLY EARNINGS	EMPLOYED FROM Mo. Year	TO Mo. Year	REASON FOR LEAVING	TITLE AND DUTIES OF YOUR POSITION (ATTACH ADDITIONAL SHEETS IF NECESSARY)
American Academy in Rome	Fellowship $3800/an.	Sep 1961	Sep 1963	end of period of fellowship	Fellow — Prix de Rome in Creative Writing (independent study)
Houghton Mifflin Co Boston	$650/mo.	Feb 1958	July 1961	above appointment	Editor — Trade Dept (editing general fiction and non-fiction books)
University of Chicago USAF Test Construction Project, Chicago 37, Ill	$200/mo. (part time)	Feb 1956	Jun 1957	off to Harvard	Test Editor (editing tests for USAF correspondence courses — college level)
Various colleges and Calif. Dept. Rel. Health	various	total of 4 years.			Lab. Assistant — Research Assistant

15. REMARKS. ATTACH ADDITIONAL SHEETS OF PAPER IF MORE SPACE IS NEEDED.

I declare, subject to the penalties of perjury, that the statements made in this application (including statements made in any accompanying papers) have been examined by me and to the best of my knowledge and belief are true and correct.

28 October 1963
Date

George Starbuck
Signature of Applicant

Type or Print Name

FOR CIVIL SERVICE USE: Serial Number ☐ ☐ MO. DA. | FEE RECEIVED $ ¢

212

[fol. 300]

PLAINTIFF'S EXHIBIT 12

(Letterhead of State University of New York, Albany 1)

The accompanying publication entitled "Regents Rules on Subversive Activities" contains those sections of the State Education Law which deal with the matter of subversive activities together with the rules established by the Regents in accordance therewith.

You will note, while both the Law and regulations are very specifically directed toward the elimination and non-appointment of "Communists" from or to our teaching ranks, they also set up safe-guards in terms of definitions and procedures, intended to protect the civil rights of the individual.

The regulations provide, among other things, that a person who was a member of the Communist Party but who severed all connections prior to October 4, 1953, must "show that such membership has been terminated in good faith."

In the case of new employees, it is required that such matters be cleared prior to initial appointment.

In order that such situations may be handled with maximum discretion and projection to the individual concerned, any candidate who is faced with the problem of properly executing the enclosed statement is requested to place the matter before me personally on a confidential basis with the assurance that any further action on the matter will be only with the candidate's concurrence.

The enclosed statement is intended to make certain that all new employees have had an opportunity to familiarize themselves with some of the basic legal requirements for employment in the University and may certify to the fact that they meet such qualifications. Please sign it and

return it to the Dean of the institution at which your appointment is being considered.

J. Lawrence Murray
Secretary of the University
and
Acting Chief Administrative Officer

[fol. 301]

PLAINTIFF'S EXHIBIT 13

(Letterhead of State University of New York, Albany, New York)

January 17, 1964

Raymond G. Hunt, Ph.D.
Chairman, Committee on Academic Freedom
and Tenure, AAUP
205 Townsend Hall
State University at Buffalo
Buffalo, New York 14214

Dear Dr. Hunt:

This is in answer to your request for information as to the position of State University of New York with respect to the Feinberg Law (Education Law, Section 3022, as amended).

The board of trustees on May 10, 1956, established an ad hoc committee by Resolution 56-47, as reported on pages 98-99, of *Minutes of Meetings of the Board of Trustees, 1956,* verifax copy attached, marked Exhibit A. The resolution was prefaced by introductory comment, as reported in the minutes, that "The Chairman (Mr. Moore) stated that he believed this was a matter of great importance . . ."

The ad hoc committee on security regulations in recruitment of academic personnel reported to the board, as noted in the minutes of October 11, 1956 (page 163, *ibid.* verifax

copy attached, marked Exhibit B) and the board of trustees by Resolution 56-98 adopted a Procedure on New Academic Appointments. This procedure, as adopted, constituted an attachment which is not reproduced in the printed volume of the minutes. A carbon copy of the official attachment which is on file with the minutes at the offices of the board of trustees is enclosed herewith, as Exhibit C.

The minutes observe, at page 163, that the "procedure conformed to the procedure followed by the Board of Higher Education of the City of New York," and that the chairman of the ad hoc committee of the trustees "stated that he believed it was desirable for the two boards administering public institutions of higher education in New York State to have similar procedures in this matter."

The University's procedure, as it appears in Exhibit C hereto, was transmitted to chief administrative officers by memorandum from President Carlson dated April 24, 1957, copy attached as Exhibit D.

[fol. 302] State University's position in the matter of academic freedom is clear, and has been stated with vigor, as for example in the recent matter involving Mr. Aptheker.

State University's responsibility to comply fully with the Laws of New York State is also clear. The 1956 procedure has been found satisfactory. It is evident that the board of trustees recognizes its responsibility both to the principles of academic freedom and to the administration of proper and reasonable procedures to insure that no subversives are employed.

I will be pleased to meet with your committee for further discussion of this matter, if you wish, and for this purpose I could come to Buffalo on any date during the week of January 20-24.

Very truly yours,

/s/ D. S. Price
David S. Price
Assistant Vice President

Enclosures:

Exhibits A to D, as identified
in body of letter.

cc/ President Furnas—SUNY at Buffalo
Mr. J. L. Murray
Mr. John C. Crary, Jr., Esq.

[fol. 303]

EXHIBIT A TO LETTER

3.3 *Orange County Community College Budget Adjustment*

Mr. Greenman stated that on April 11, 1955 the Board of Trustees of Orange County Community College had approved a revision in the 1954-55 operational budget of that Institute because of unanticipated increases in enrollment which necessitated the expansion of faculty and purchase of additional instructional supplies. He noted that through an oversight State University was not notified of this action, but that the matter was brought to the attention of State University by the Department of Audit and Control of the State of New York. He stated that the staff had examined the proposed change and that the Committee believed it was justified.

Upon motion of Mr. Greenman, seconded by Mr. Hausman, it was unanimously:

Resolved that an increase in the operational budget of Orange County Community College from $230,000 to $334,550 for the period September 1, 1954 to August 31, 1955 be, and hereby is, approved (56-46)

4. REPORT OF THE PRESIDENT

4.1 *Security Clearance for Faculty Appointees*

The President noted that he had distributed to the Board memoranda relative to the requirements of the Feinberg Law concerning the recruitment of personnel.

The Chairman stated that he believed this was a matter of great importance and that an *ad hoc* committee of the Board should study this matter.

Upon motion of Mr. Greenman, seconded by Mrs. Donnelly, it was unanimously:

Resolved that the Chairman is hereby authorized to appoint an *ad hoc* Committee on Security Regulations in Recruitment of Academic Personnel (56-47)

The Chairman stated that he was asking Mr. Garside to serve as Chairman of the Committee with Dr. Murray and Mr. Scheiberling as the other members.

4.2 *Dormitory Fee and Refund Schedule*

The President stated that since the State University has now taken over operation of the dormitories it would be necessary for the Board to authorize him to establish rental and board charges and a refund policy. He stated that it was his intention to continue the schedule of rents and the policy on refunds which were in effect when the dormitories were operated by the Dormitory Authority.

Upon motion of Mr. Goetz, seconded by Mr. Hausman, it was unanimously:

Resolved that Resolution 56-12 concerning board and room charges at the Maritime College be, and hereby is, repealed, and that the President be, and hereby is, authorized as follows:

1. To fix such a schedule of rents payable by students at student housing facilities leased or owned by the State of New York or State University, as will pay all costs required by law to be met from such rental income; to establish the time and method of payment of such charges; and to determine rental refund policies.
2. To fix such a schedule of board charges or combined board and room charges as will pay all costs re-

quired by law to be met from such income funds and to determine appropriate refund policies. Such authority may be assigned to the chief administrative officer of an institution subject to such regulation as the President shall establish. (56-48)

4.3 *Facilities for Long Island*

The President stated that the Division of the Budget had informed him that money would be made available to the State University for the purpose of planning and conducting studies relative to portions of the State University program for Long Island which had been approved by the Board of Regents.

[fol. 304]

EXHIBIT B TO LETTER

closing of Hermann M. Biggs Memorial Hospital to transfer to available openings at the State Colleges at Cornell and Alfred without losing credit for their years of State service.

Upon motion of Mr. Garside, seconded by Mrs. Donnelly, it was unanimously

Resolved that a bill be sponsored at the 1957 session of the Legislature to give service credit for salary purposes to former State civil service employees in allocated positions appointed to positions in the non-professional services at the New York State Colleges administered by Cornell and Alfred Universities under the supervision of the State University. (56-97)

5. REPORT OF THE *AD HOC* COMMITTEE ON SECURITY REGULATIONS IN RECRUITMENT OF ACADEMIC PERSONNEL

Mr. Garside reported that the Committee was prepared to recommend a new procedure for compliance with the Feinberg Law (Education Law § 3022).

Mr. Garside read the proposed procedure to the Board (Attachment B). He noted that this procedure conformed to the procedure followed by the Board of Higher Education of the City of New York, and he stated that he believed it was desirable for the two Boards administering public institutions of higher education in New York State to have similar procedures in this matter.

After some discussion upon motion of Mr. Garside, seconded by Mrs. Donnelly, it was unanimously:

> *Resolved* that effective October 11, 1956 all new academic appointments to any unit of the State University of New York shall be made in accordance with the Procedure on New Academic Appointments incorporated into these minutes as Attachment B. (56-98)

The Chairman discharged the Committee with thanks.

[fol. 305]

EXHIBIT C TO LETTER

Attachment B

Procedure on New Academic Appointments

1. A prospective candidate will be required to set forth the name and address of his present employer and his immediate supervisor there. The candidate should also set forth the name and address and immediate supervisor of his past employers, leaving no gaps in time.

2. Letters of recommendation should be sought from the present or past employers inquiring, among other things, as to the qualities of the candidate's citizenship and personality.

3. The chief administrative officer having interviewed a prospective candidate, reviewed his or her qualifications and consulted with the appropriate Department or Division Chairman, comes to the point of readiness to make a specific recommendation of appointment.

4. The chief administrative officer then asks the candidate to read a copy of the "Regents Rules on Subversive Activities" together with the attached letter from the President of the University and the attached Certificate to be executed by the candidate.

5. The chief administrative officer transmits to the President his recommendations for appointment together with the following statement:

"Upon inquiry I find no reason to believe that .... does not meet the requirements of Education Law, § 3022 (The Feinberg Law) and of the Regents Rules pertaining thereto.

.....
(Signature) "

[fol. 306] The chief administrative officer also transmits the Certificate executed by the candidate, or if the candidate desires to see the President prior to executing the Certificate, a statement to that effect.

6. In the event the President interviews the candidate, the President will reduce the substance of the interview to writing.

7. The information obtained concerning any candidate will be transmitted to the President by the chief administrative officer with his recommendation for appointment and, in the case of appointments required to be made by the Board of Trustees, will be transmitted to the Board by the President with his recommendation.

[fol. 307]

ATTACHMENT TO EXHIBIT C

Form of President's Letter

.....

(Date)

Dear .....:

The accompanying publication entitled "Regents Rules on Subversive Activities" contains those sections of the State Education Law which deal with the matter of subversive activities together with the Rules established by the Regents in accordance therewith.

You will note that while both the Law and regulations are very specifically directed toward the elimination and non-appointment of "Communists" from or to our teaching ranks, they also set up safeguards in terms of definitions and procedures, intended to protect the civil rights of the individual.

The regulations provide among other things that a person who was a member of the Communist Party but who severed all connections prior to October 4, 1953, must "show that such membership has been terminated in good faith".

In the case of new employees, it is required that such matters be cleared prior to initial appointment.

In order that such situations may be handled with maximum discretion and protection to the individual concerned, any candidate who is faced with the problem of properly executing the enclosed statement is requested to place the matter before me personally on a confidential basis with the assurance that any further action on the matter will be only with the candidate's concurrence.

The enclosed statement is intended to make certain that all new employees have had an opportunity to familiarize themselves with some of the basic legal requirements for

employment in the University and may certify to the fact that they meet such qualifications. Please sign it and return it to .....

(Chief Administrative Officer)

Cordially yours,

_____

[fol. 308]

ATTACHMENT TO EXHIBIT C

Form of Certificate

.....

(Name of Institution)

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

• • • • • • •

This is to certify that I have read the publication of the University of the State of New York, 1955, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

Date: ....

[fol. 309]

EXHIBIT D TO LETTER

STATE UNIVERSITY OF NEW YORK

ALBANY 1

Office of the President April 24, 1957

MEMORANDUM

To: Chief Administrative Officers

Re: Procedure on New Academic Appointments

Under separate cover there are being forwarded to you copies of the uniform procedure prescribed by the Board of Trustees to be followed in making new academic appointments for the purpose of insuring continued and full compliance with the requirements of Education Law Section 3022, known as the Feinberg Law.

The Feinberg Law (Education Law § 3022) was designed to provide more effective means of carrying out the provisions of existing prohibitions against the employment of subversive persons in publicly supported educational institutions. It provides for the disqualification or removal, among others, of the faculty members and all other personnel and employees of any institution of higher education owned and operated by the State who violate the provisions of Education Law § 3021 or who are ineligible for appointment to, or retention in, their employment on any of the grounds set forth in Civil Service Law § 12-a. Section 3021 provides for removal of such employees for treasonable or seditious words or acts while holding their positions. The Civil Service Law provision disqualifies such persons for appointment or retention if they wilfully and deliberately advocate, advise or teach the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means. Included in the prohibited acts are the compilation or dissemination of docu-

ments advocating, advising or teaching such doctrine and organizing or becoming a member of any society or group of persons which teaches or advocates such doctrines. These provisions have been held to furnish a constitutionally sufficient definition of what constitutes a subversive person.

The Feinberg Law reiterates the disqualification of subversive persons for employment in educational institutions and also provides that membership in subversive organizations, as listed by the Regents after inquiry, shall be *prima facie* evidence of disqualification for employment in the public schools. Its provisions have been held constitutional (*Adler* v. *Board of Education*, 342 U. S. 485).

[fol. 310] The Regents have listed the Communist Party of the United States and the Communist Party of the State of New York as subversive organizations. In making that finding, the Regents said:

> "The Feinberg Law (Chap. 360, Laws 1949) is not a license for 'witch hunting,' for a finding of guilt by association, for thought control, for impairment of academic freedom nor for any infringement of constitutional rights."

It is only persons who are subversive as defined in the statutes who are ineligible for employment in public educational institutions. It is our duty, however, to take appropriate steps to prevent the appointment or retention of such persons.

As you know, we have complied with those provisions of the statute prohibiting the continued employment of subversive persons by annually having each of you make due inquiry to determine whether there is any reason to believe that any of the faculty members or other employees at your respective institutions are subversive as specified in the applicable statutes and by certifying the results of your findings to the Board of Regents.

The new procedure has been devised to establish a uniform, university-wide, method of meeting the requirements

of the law with respect to new appointments. It is hoped that it will aid in eliminating uncertainties as to the objectives and methods of the inquiry that must be made and assist in preventing both unwarranted intrusion on personal freedoms and employment of subversives.

The principal source of information to be secured, aside from personal interview, is from present and past employers and immediate supervisors. Inquiry is made of those sources, in any event, as to professional and personal qualifications, and with it should be combined a request for information from which you can reach an informed conclusion as to whether an applicant is a subversive person within the meaning of the statutes above discussed.

The proposed appointment must be found to comply with the requirements of the Feinberg Law in addition to other relevant qualifications. The requirement that the candidate read the "Regents' Rules on Subversive Activities" which are to be delivered to him with the prescribed letter signed by me is to familiarize him with these legal requirements of [fol. 311] his employment and the opportunity for conference with me in case of question as to the certificate of the candidate protects him from unfair implications. His own certificate records his acknowledgment of the requirements and his own representation that he meets them.

I will be glad to consult with any of you who may encounter particular problems in the application of the procedure. I believe the uniform procedure will assure our compliance with the law without unnecessary difficulty for you or for prospective appointees.

Sincerely,

/s/ William S. Carlson
William S. Carlson

[fol. 312]

DEFENDANTS' EXHIBIT 2

[Stamp—Personnel Office—May 21 1963—State University of New York]

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

THE STATE CAMPUS • 1220 WASHINGTON AVENUE

ALBANY 1, NEW YORK

COMMISSION
H. ELIOT KAPLAN
PRESIDENT

ALEXANDER A. FALK
MARY GOODE KRONE

WILLIAM J. MURRAY
ADMINISTRATIVE DIRECTOR

May 20, 1963

Mr. David Price
Director of Personnel
State University of New York
8 Thurlow Terrace
Albany, New York

Dear Dave:

Your letter of May 1st to President Kaplan was discussed at length at the meeting of the Civil Service Commission on May 8. Many of the matters to which you referred are considered administrative and, therefore, not the direct concern of the Civil Service Commission but rather that of the Department. However, this letter attempts to convey the views both of the Commission and the Department regarding your proposals.

The Civil Service Commission reaffirmed its determination made in January of this year that librarian positions

in the State University are in the classified service. With the exceptions stated at that time, it believes that these positions should be in the competitive class.

In the course of the discussion which ensued among the two members of the Commission present (President Kaplan is, as you know, in the hospital) and the members of the staff, the following comments were made concerning your letter:

(1) The objections which you take to the State salary and classification plan are not unique to the State University. Almost any department head can—and many have—urge that the problems of his particular agency are unique and require special classification or salary treatment. As an old classification man, I am sure you would accept the validity of this statement. Modifications within the existing classification and salary plan, e.g., the creation of intermediate classes if needed, can be taken up with the Classification and Compensation Division, and the Director of that division indicated that arrangements could be made to establish different classes in this field for State University if the classes could be distinguished one from the other with clarity and if the class distinctions were based upon material rather than minor differences.

The other statements which you make regarding the qualifications of individuals, flexibility for initial hiring, etc., are also desired by most appointing officers. As you know, certain relief can be obtained in good cases but the full flexibility which State University appears to desire is not easily obtained within the framework of a standardized system designed to control job classification and, in the long run, State expenditures. Librarians are not "professional" to a greater degree than doctors, lawyers, engineers, accountants, etc. If we assume that the professional aspirations of every group are to be accommodated, it would only be a matter of time until the civil service of the State was reduced to a residue of clerical and possibly investiga-

[fol. 313] tional positions. Even the investigators think of themselves as professionals nowadays.

I am sure it is unnecessary for me in the light of your long experience to belabor this point; but from the standpoint of this Department it is very difficult for us to single out a profession or group of professionals and treat them differently in terms of recruitment and compensation than we would other equally or better qualified professionals. There are very few people, especially among the professional groups, who wish to take examinations. Insofar as academic status is concerned, we think from a variety of evidence that we receive that anyone with a remote claim would like to have academic status. But we cannot agree that proper merit system recruitment is irreconcilable with the maintenance of good standards for librarians or other professionals in the colleges. Even if we did, the Constitution and the laws of the State would direct otherwise.

(2) Coming now to your suggestions regarding an interim solution to cover the problems in the academic year 1963-64:

(a) Your suggestion No. 1 has in general been done. If there are exceptions, I believe arrangements can be made to implement this suggestion.

(b) It seems appropriate to leave unchanged, for the time being at least, all existing competitive class positions of Assistant Librarian, SG-14, and Senior Librarian, SG-18. We are not certain which positions you are referring to in the latter half of your sentence but if these positions have been officially recognized by the Commission as unclassified, there would appear to be no reason for changing them at this time.

(c) As to your suggestion No. 3, much discussion was engendered. Frankly, we were unable to under-

stand your reasoning. Our Counsel pointed out that Section 355-a of the Education Law gives the educational authorities the power, with the approval of the Budget Director, to classify *faculty* positions. These are positions which are in the unclassified service within the definition of the Civil Service Law. We think that your argument begs the question in that you assume that certain positions are in the unclassified service and, therefore, under the jurisdiction of your agency for classification purposes. We are unable to accept in many cases the conclusion that these are teaching positions and, therefore, in the unclassified service.

(d) Item No. 4 in your letter proposes two alternatives to take care of the situation pending what you call "resolution of the longer range problem." We are agreeable to treating the positions as being in the competitive class and allowing appointments to be made pursuant to Section 64-3 of the Civil Service Law for such period of time as is reasonably necessary to complete a classification survey. I was asked to advise you that we would hope that this survey can be "accomplished with dispatch." It seems to all of us that many of the problems which confront you now are aggravated by the fact that we have not come to grips with the classification of many of [fol. 314] the positions in the State University even though these positions have existed for a long time. We are willing to share some of the blame for this but we think it is by no means one-sided. We are convinced that further delay in squarely facing up to the problems of classifying your positions and identifying those which properly belong in the unclassified service will further exacerbate an already difficult situation.

The Division of Classification and Compensation stands ready to work actively with you in classifying positions throughout the University including these librarian positions. Our Examinations Division, and especially the Recruitment Bureau of that Division, will also cooperate most actively in facilitating your efforts to hire good librarians during the next year. We strongly urge that during this interim period while appointments are being processed on a temporary basis that steps be taken to put this whole process on a more orderly basis for the future. You have asserted previously that modifications of our traditional examining processes worked very well in recruiting librarians. We are only in the inception of rapid recruitment programs of all sorts and certainly we are most anxious to assist you in this field where recruitment will be difficult no matter how it is done or who does it.

(e) We see no problem in terms of applying the provisions of the Attendance Rules to employees whose status in the classified service is formalized for the first time. Under the Attendance Rules prior State service counts in determining vacation earning rate. The rate of earning would be the same as if the employee had always been recognized as being in the classified service. It is also subject to the same limitations on total accumulation, i.e., 30 days vacation and 150 days sick leave.

(f) For the reasons noted above and for others which can be cited when we come to confer on this matter, we cannot agree to the deferment of a position classification study of positions which you refer to as "previously unclassified." You are, of course, at liberty to introduce such legis-

lation as your Board would deem appropriate but we see no advantage to deferment even if these positions were eventually to be taken out of the classified service. It is never certain that legislation can be obtained on any subject. It is also possible that if a survey could be made and the results deemed practicable by you, you might find it unnecessary to seek legislation. In any event, we have a responsibility now which we feel should not be deferred to an indefinite future. In our estimation it has already been deferred too long and steps should be taken this year to deal with these positions in what we believe to be the manner required by law.

As soon as possible we would appreciate the opportunity to sit down and talk this whole matter out with you and seek a basis for getting on with the solution of our mutual problems.

Very truly yours,

/s/ W. J. Murray
W. J. Murray
Administrative Director

[fol. 315]

Defendants' Exhibit 3

January 21, 1963

Mr. David Price
Director of Personnel
State University of New York
8 Thurlow Terrace
Albany, New York

Dear Mr. Price:

The State Civil Service Commission at its meeting on January 15, 1963 considered your proposal to declare Librarian positions in the unclassified service.

The Commission did not approve designation of these positions in the unclassified service, but did approve exempt classification of the top Librarian of each of the colleges and voted to keep all other Librarian positions in the competitive class of the classified service.

A resolution is being forward to the Governor and you will be informed of his action.

Very truly yours,

W. J. Murray
Administrative Director

WJM:cd

[fol. 316]

EXHIBIT "7" TO STIPULATION OF FACT

The University of the State of New York

The State Education Department

Regents Rules

on

Subversive Activities

ALBANY

THE UNIVERSITY OF THE STATE OF NEW YORK PRESS

1959

W223r-S59-1000(44250)*

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University

With years when terms expire

1969 JOHN F. BROSNAN, A.M., LL.B., J.D., LL.D., D.C.L., D.C.S., Pd.D., *Chancellor* - - - - - - - - - - - New York

1968 EDGAR W. COUPER, A.B., LL.D., *Vice Chancellor* - - - Binghamton

1963 MRS. CAROLINE WERNER GANNETT, LL.D., L.H.D., D.H. Rochester

1961 DOMINICK F. MAURILLO, A.B., M.D., LL.D., Sc.D. - - Brooklyn

1964 ALEXANDER J. ALLAN, JR., LL.D., Litt.D. - - - - - - Troy

1967 THAD L. COLLUM, C.E. - - - - - - - - - - - - - Syracuse

1966 GEORGE L. HUBBELL, JR., A.B., LL.B., LL.D. - - - - - Garden City

1960 CHARLES W. MILLARD, JR., A.B. - - - - - - - - - - Buffalo

1965 CHESTER H. LANG, A.B., LL.D. - - - - - - - - - - Schenectady

1970 EVERETT J. PENNY, B.C.S., D.C.S. - - - - - - - - - White Plains

1972 CARL H. PFORZHEIMER, JR., A.B., M.B.A. - - - - - - Purchase

1962 EDWARD M. M. WARBURG, B.S., L.H.D. - - - - - - New York

1971 J. CARLTON CORWITH, B.S. - - - - - - - - - - - - Water Mill

President of the University and Commissioner of Education

JAMES E. ALLEN, JR., Ed.M., Ed.D., LL.D., Litt.D., Pd.D., L.H.D.

Deputy Commissioner of Education

EWALD B. NYQUIST, B.S., LL.D., Pd.D., L.H.D.

Counsel

CHARLES A. BRIND, LL.B., LL.D.

Division of Law

JOHN P. JEHU, LL.B., J.U.D., *Director*

ELIZABETH M. EASTMAN

GEORGE B. FARRINGTON, A.B., LL.B.

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FOREWORD

Section 3022 of the Education Law requires the Board of Regents to "adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law." The sections of the law define certain types of subversive activity, and make mandatory the dismissal of school officials, teachers, or other employees who engage in such activity.

Inquiries with respect to the administration of the Regents Rules should be addressed to the Office of Counsel, State Education Department, Albany 1, N. Y.

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RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

ARTICLE XVIII

SUBVERSIVE ACTIVITIES

Section 244 Disqualification or removal of superintendents, teachers and other employes.

1 The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization,

* Now section 105.

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recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision *b* of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision *b* of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision *d* of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2 Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system.

* Now section 105.

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Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3 On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4 Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

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COMMISSIONER'S MEMORANDUM
ON
ADMINISTRATION OF REGENTS RULES
RELATING TO SUBVERSIVE ACTIVITIES

Boards of education and school trustees have always been under obligation to provide such supervision of teachers and other employees as will insure sound teaching and a wholesome school environment. Chapter 360 of the Laws of 1949 (commonly referred to as the Feinberg Act) imposes on school authorities no new supervisory responsibility. The new legislation has the effect simply of directing attention to a special supervisory need — namely, the need "to protect the children in our State from . . . subversive influence" — which the Legislature finds to be particularly acute at the present time, and of requiring the Board of Regents to prescribe procedures under which special attention will be given to this need.

The rules established by the Regents in response to the direction of the Legislature are largely self-explanatory. The rules provide systematic procedures for identifying and removing from the school system disloyal teachers or other employees.

On four major points certain supplementary comments may be appropriate. These points are (1) the responsibility of the officials designated by school authorities for reporting on teachers and other employees, (2) the types of conduct which may properly be considered by school authorities as subversive within the meaning of section 3021 of the Education Law and section 12-a* of the Civil Service Law, (3) the rights of a person accused of subversive activity to a hearing on charges, and (4) the listing of organizations found by the Regents to be subversive within the meaning of the law.

1. Reports by school officials. The officials designated by school authorities to report on teachers and other employees will face a two-fold duty. It will be their responsibility, on the one hand, to help the school authorities rid the school system of persons who "use their office or position to advocate and teach subversive doctrines." On the other hand, it will be their responsibility so to

* Now section 105.

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conduct themselves and their inquiries as to protect and reassure teachers who are not subversive.

School authorities will need to select with great care the officials who are to be entrusted with this duty.* The officials chosen should be persons of wide acquaintance within the school system, sound judgment in matters of personal relationships, and sufficient maturity and professional experience to have won the respect of the other local officials, teachers and school employees and of the general public. Furthermore, these officials must be close enough to the work of the classroom teacher so that they will have a real understanding of the methods of presentation that may make the difference between teaching which is subversive in intent and teaching which has neither a subversive purpose nor subversive results.

In preparing the reports which they are to render to the school authorities, the designated officials will of course use their own acquaintance with the teachers for whom they are responsible as an immediate guide. If these officials are in fact well acquainted with the individual teachers on whom they are to report, they will already be in possession of sufficient facts either to substantiate their judgment of a teacher's loyalty or (in the case of teachers about whom they have some question) to indicate the need for further evidence. In weighing such further evidence the officials should be guided by the considerations presented in section 2 of this memorandum. Any evidence submitted to such officials which reflects adversely on a teacher, they are bound to examine promptly, dispassionately and thoroughly.

The designated officials should bear in mind for their own guidance, and where appropriate should bring to the attention of others, the fact that while statements made in connection with an official charge of disloyalty are legally privileged, no privilege attaches to gossip and the circulation of rumor. In this latter connection attention is called to the *Matter of Mencher* v. *Chesney*, 297 N.Y. 94 (101) in which the Court of Appeals stated: "The courts have held that a false charge that one is a Communist is basis for a libel action."

2. **Subversive activity.** The Education Law and the Civil Service Law make it entirely clear that a teacher or other employee who "wilfully and deliberately advocates, advises or teaches the

* School authorities in districts employing fewer than eight teachers will ordinarily find it advantageous to designate one or more of their own number as the official or officials to make the required reports. When there is only a single trustee in such a district, he or she will presumably make all the reports required by the Regents Rules.

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doctrine that the government of the United States or of any State or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means," or who participates in the preparation, publication or distribution of written or printed matter advocating such a doctrine or advising its adoption, or who "organizes or helps to organize or becomes a member of any society or group of persons" which teaches or advocates such a doctrine, or who utters "any treasonable or seditious word or words" or does "any treasonable or seditious act or acts," is engaging in subversive activity and is subject to dismissal. It should be noted that this activity need not be merely by word of mouth. The writing of articles, the distribution of pamphlets, the endorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity. Nor need such activity be confined to the classroom. Treasonable or subversive acts or statements outside the school are as much a basis for dismissal as are similar activities in school or in the presence of school children.

It must be borne in mind that teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American form of government and American institutions, which cannot in any just sense be construed as subversive. Especially if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and foreign governments (including the people and government of Russia), not for the purpose of advocating changes in our own government but for the purpose of acquainting their pupils with the kinds of government under which other peoples live.

Moreover, teachers who take full advantage of their own privileges as citizens may raise questions and make suggestions outside their classrooms, about improvements in our form of government. In addition, they may quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own.

School authorities and the officials designated in accordance with the Regents Rules must be alert to guard such teachers against unjust accusation and condemnation. In particular, they should reject hearsay statements, or irresponsible and uncorroborated statements, about what a teacher has said or done, either in school or outside. They should examine an accused teacher's statements, writing or action in their context, and not in isolated fragments. They

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must insist on evidence, and not mere opinion, as a basis for any action which they may take.

But the statutes and the Regents Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case.

3. **The preferring of charges.** Neither section 12-a* of the Civil Service Law nor sections 3021 and 3022 of the Education Law modifies in any way the rights accorded to teachers under the tenure laws.

Teachers serving on tenure cannot be dismissed, whether for subversive activities or for any other cause, without opportunity for a hearing, of which a stenographic record must be made. Written charges must be served. Accused teachers must be given opportunity to appear in person or by counsel, before either a duly appointed trial committee or the full board of education, as the law may provide. Teachers have the right to subpoena witnesses (including their accusers), to present witnesses in their own behalf, and to cross-examine opposing witnesses. They have also the full right of appeal.

4. **List of subversive organizations.** The Regents have published a list of organizations which, in accordance with section 3022 of the Education Law, they have found to be subversive in that the said organizations "advocate, advise, teach or embrace the doctrine that the government of the United States or of any State or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine." School authorities are responsible for proceeding with all diligence in the cases of teachers whose acts other than membership in the listed organizations fall within the purview of the statutes.

In the reports required as of October 31, school authorities will be expected to indicate the measures which they have put into effect prior, as well as subsequent, to the publication of the Regents list.

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* Now section 105.

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THE UNIVERSITY OF THE STATE OF NEW YORK

Organizations Listed by the Board of Regents of The University of the State of New York as Subversive Pursuant to Section 3022 of the Education Law

Name of Organization	*Date of Listing*
Communist Party of the United States of America	September 24, 1953
Communist Party of the State of New York	September 24, 1953

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SECTION 1 OF

CHAPTER 360, LAWS OF 1949

Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

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EDUCATION LAW

§ 3021. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances. A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. Elimination of subversive persons from the public school system. 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a* of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a* of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide

* Now section 105.

[fol. 331]

in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

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CIVIL SERVICE LAW

§ 105. Subversive activities; disqualification. 1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may

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have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

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No. 5738

THE UNIVERSITY OF THE STATE OF NEW YORK

The State Department of Education

Before the Commissioner

IN THE MATTER

of the

Appeal of Irving Adler from certain action and threatened action of the Board of Education of the City of New York and William Jansen, as Superintendent of Schools of the City of New York, in applying a so-called " Statement of Policy " adopted by the Board of Education of the City of New York on December 6, 1951.

Witt & Cammer ..... Attorneys for Appellant

Denis M. Hurley, Corporation Counsel ... Attorney for Respondent

September 26, 1952

NEW YORK CITY—BOARD OF EDUCATION (Power and Duties)—TEACHERS (Tenure and Dismissal) (Membership in Organizations)

Appellant when asked whether he is or was a member of Communist Party refused to answer and sought to restrain Board of Education from proceeding further — Appeal dismissed — Board has legal right to seek information from employees whether or not they belong to organization which may be subversive — unless there appears a good and sufficient reason for refusal to answer, Board has legal right to dismiss teacher — no provision in Feinberg Law or Rules of Board of Regents which would prevent Board of Education of City of New York from independently establishing list of its own of organizations which advocate overthrow of the Government by force or from questioning any teacher as to membership in any organization which it suspects is in such category.

Wilson, Commissioner. Upon the direction of the Superintendent of Schools of the City of New York, the appellant herein who has been for some time a teacher in the schools of the City of New York, has been asked whether he is or has been a member of the Communist Party. He has refused to answer and seeks to restrain the Board of Education from proceeding further.

While the petition and briefs present several phases of this matter, fundamentally there seem to be but three issues involved, 1) has the Board of Education the right to ask him whether or not he is or has been a member of the Communist Party, 2) is he obliged to answer under penalty of dismissal, and 3) what effect, if any, does the Feinberg Law of this State (Chap. 360, L. 1949) have upon the matter.

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The first question, I think, has been settled by the courts and presents no particular problem. There seems to be no doubt that the Board of Education has a legal right to seek information from its employees as to whether or not they belong to an organization which may be subversive. In *Garner v. Los Angeles Board*, 341 U. S. 716 (1951) the United States Supreme Court upheld the constitutionality of an ordinance of the City of Los Angeles requiring its employees to state by affidavit whether or not they were or had been members of the Communist Party or of the Communist Political Association. The Court said (at p. 720):

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The answer to the second question flows from the answer to the first. If the Board has the legal authority to ask its employees whether they are members of an organization held to be subversive, it must follow that the Board is entitled to an answer. Unless there appears a good and sufficient reason for refusal to answer, and no such reason occurs to me presently, the Board has the legal right to dismiss. The Board must, of course, follow the statutory requirements in respect to removal proceedings before so doing.

As to the third question, in my opinion there is no provision contained in the so-called Feinberg Law or in the Rules of the Board of Regents which would prevent the Board of Education of the City of New York from independently establishing a list of its own of organizations which advocate the overthrow of the Government by force, or from questioning any teacher as to his or her membership in any organization which it suspects is in such category.

THE APPEAL IS DISMISSED.

NOTE. An attempted review of this decision of the Commissioner of Education before the courts was unsuccessful: *Adler et al. vs Wilson et al.*, 203 Misc. 456; affd. 282 App. Div. 418; motion for leave to appeal denied, 306 N.Y. 981.

[fol. 336]

No. 6064

THE UNIVERSITY OF THE STATE OF NEW YORK

The State Department of Education

Before the Commissioner

IN THE MATTER

of the

Appeals of Benjamin H. Baronofsky, Henry Danielowitz, Mildred Grossman, Maurice Kurzman and Abraham Squire from the action of the Board of Education of the City School District of the City of New York

Shapiro, Rabinowitz & Boudin ..... Attorneys for Appellants, Benjamin H. Baronofsky, Henry Danielowitz, Mildred Grossman and Maurice Kurzman.

Harold I. Cammer ..... Attorney for Appellant, Abraham Squire.

Peter Campbell Brown .. Corporation Counsel, Attorney for Respondent, Daniel T. Scannell, Helen R. Cassidy, of Counsel.

July 5, 1955

NEW YORK CITY—BOARD OF EDUCATION (Powers and Duties)—TEACHERS (Membership in Subversive Organizations) (Tenure and Dismissal) (Discipline)

Legal right of Board of Education to inquire of teaching staff as to membership in Communist Party settled in *Adler et al.* v. *Wilson* — Case also determined that refusal to answer was insubordination and subjected teacher to discipline — Rules of Regents specified that prior membership in Communist Party creates presumption of continued membership unless refuted by accused — Board, in dismissing appellants who refused to answer questions concerning their possible membership in Communist Party, acted within sphere of authority — Trials of appellants held at time that Adler case had been appealed and Board was stayed from further action as to parties in that proceeding but stay did not apply to appellants — Appellants refused to answer questions which court has now held proper — Requirement to answer is absolute — However, Board is without power to require teacher to answer questions relating to possible knowledge of other persons who may have been associated with Communist Party — Appeal dismissed

Wilson, Commissioner. The appellants herein have been employed for a varying number of years as teachers in the public school system of the City of New York. Each of them has been charged with insubordination and conduct unbecoming a teacher by the Board of

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Education of the City of New York upon the recommendation of the Superintendent of Schools.

They were accorded a hearing before a trial committee of the Board of Education. Such trial committee found them guilty as charged and so recommended to the Board of Education. They were promptly dismissed by the Board.

The gravamen of the charges consisted of the refusal of each of the appellants to answer certain questions put to them by a duly authorized representative of the Superintendent of Schools concerning their possible membership in the Communist Party. Mildred Grossman stated that she was not a member of the Party but refused to answer any questions as to prior membership or Party activity prior to the date of the enactment of the Feinberg Law (April, 1949). The balance of the appellants refused to answer any questions concerning membership in the Communist Party either present or past. Subsequently the appellants were given another opportunity to reconsider their position and in an interview by the deputy or assistant superintendent of schools, each of the five maintained their prior position except Maurice Kurzman who then stated that he was not at that time a member of the Communist Party but he still refused to make any statement concerning any possible prior membership.

At the trial of these charges before the trial examiner, each continued to maintain his position except Abraham Squire, who requested the trial examiner for an opportunity to continue his interview before the representative of the Superintendent of Schools aforesaid, with the understanding that the testimony would be confidential, which request was granted. So a month after such event, such an interview took place.

That the Board of Education has the legal right to inquire of members of the teaching staff as to their membership in the Communist Party, was settled in the Adler case, (*Adler et al.* v. *Wilson*, 203 Misc. 456; affd. 282 App. Div. 418; Motion for leave to appeal denied, 306 N. Y. 981.) and confirmed by the Regents by their determination dated September 24, 1953 in listing the Communist Party as a subversive organization within the meaning of the Feinberg Law. Such case also determined that refusal to answer was insubordination and subjected the teacher to discipline. Furthermore, the rules of the Regents adopted in connection with the Feinberg Law specified that prior membership in the Communist Party creates a presumption of continued membership unless refuted by the accused. Consequently, it is quite clear that the Board, in dismissing these appellants, acted within the sphere of its authority as heretofore determined.

[fol. 338]
The only remaining question involved in this proceeding is whether the claim on the part of the appellants that they were refusing to answer until the final test of the Adler case in the courts was completed is a basis for reversal, and in the case of Squire, whether the facts discussed by him with Mr. Saul Moskoff in the last interview aforesaid, provided similar basis for reversal.

At the time of these trials it is true that the Adler case had been appealed to the Appellate Division, Third Department, and that the Board of Education had been stayed from further action as to the parties in that proceeding. Said stay did not apply to these appellants. Consequently, if they refused to answer even part of the questions which they were required to answer, hoping for a successful outcome of the Adler case and the board had dismissed them because of their refusal to answer before the final decision in such case, they might have been entitled to reinstatement, with back pay, if the Adler case had been reversed. However, this was the chance they took in maintaining such position and the chance that the board took in disciplining them, should it turn out later that the basis for the discipline was illegal.

It appearing that all of these appellants had refused to answer questions which the court has now held proper I find no basis of arbitrary or illegal conduct on the part of such board as would warrant a reversal of its determination by me. A change of position after their original refusal would only be mitigating circumstances which the board could take into consideration in fixing the penalty. It was not obligated to do so as the appellants' original refusal constituted insubordination *ab initio*.

One other matter should also be disposed of. The appellant, Benjamin H. Baronofsky, claimed that his refusal to answer was premised upon a fear that the board, if he confessed prior membership in the Communist Party, would inquire as to his knowledge of other persons who may have been members of that party to his embarrassment. The requirement to answer is absolute, and excuses such as this cannot be construed as grounds for avoidance of the penalty for refusal to answer. However, at the same time I should point out that in my opinion a board of education is without power to require a teacher to answer questions relating to his possible knowledge of other persons who may have been associated with the Communist Party.

THE APPEAL IS DISMISSED.

[fol. 339]

EXHIBIT "8" TO STIPULATION OF FACT

Attachment B

Procedure on New Academic Appointments

1. A prospective candidate will be required to set forth the name and address of his present employer and his immediate supervisor there. The candidate should also set forth the name and address and immediate supervisor of his past employers, leaving no gaps in time.

2. Letters of recommendation should be sought from the present or past employers inquiring, among other things, as to the qualities of the candidate's citizenship and personality.

3. The chief administrative officer having interviewed a prospective candidate, reviewed his or her qualifications and consulted with the appropriate Department or Division Chairman, comes to the point of readiness to make a specific recommendation of appointment.

4. The chief administrative officer then asks the candidate to read a copy of the "Regents Rules on Subversive Activities" together with the attached letter from the President of the University and the attached Certificate to be executed by the candidate.

5. The chief administrative officer transmits to the President his recommendations for appointment together with the following statement:

"Upon inquiry I find no reason to believe that..... ..... does not meet the requirements of Education Law, § 3022 (The Feinberg Law) and of the Regents Rules pertaining thereto.

....."

(Signature)

The chief administrative officer also transmits the Certificate executed by the candidate, or if the candidate de-

sires to see the President prior to executing the Certificate, a statement to that effect.

[fol. 340] 6. In the event the President interviews the candidate, the President will reduce the substance of the interview to writing.

7. The information obtained concerning any candidate will be transmitted to the President by the chief administrative officer with his recommendation for appointment and, in the case of appointments required to be made by the Board of Trustees, will be transmitted to the Board by the President with his recommendation.

[fol. 341]

Form of President's Letter

.....
(Date)

Dear .....:

The accompanying publication entitled "Regents Rules on Subversive Activities" contains those sections of the State Education Law which deal with the matter of subversive activities together with the Rules established by the Regents in accordance therewith.

You will note that while both the Law and regulations are very specifically directed toward the elimination and non-appointment of "Communists" from or to our teaching ranks, they also set up safeguards in terms of definitions and procedures, intended to protect the civil rights of the individual.

The regulations provide among other things that a person who was a member of the Communist party but who severed all connections prior to October 4, 1953, must "show that such membership has been terminated in good faith."

In the case of new employees, it is required that such matters be cleared prior to initial appointment.

In order that such situations may be handled with maximum discretion and protection to the individual concerned, any candidate who is faced with the problem of properly executing the enclosed statement is requested to place the matter before me personally on a confidential basis with the assurance that any further action on the matter will be only with the candidate's concurrence.

The enclosed statement is intended to make certain that all new employees have had an opportunity to familiarize themselves with some of the basic legal requirements for employment in the University and may certify to the fact that they meet such qualifications. Please sign it and return it to .....

(Chief Administrative Officer)

Cordially yours,

_____

.....

[fol. 342]

Form of Certificate

.....

(Name of Institution)

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the president before signing this certificate.

****

This is to certify that I have read the publication of the University of the State of New York, 1955, entitled "Re-

gents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

Date: .....

[fol. 343]

EXHIBIT "9" TO STIPULATION OF FACT

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum, are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Com-

munist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature

[fol. 344]

EXHIBIT "10" TO STIPULATION OF FACT

STATE UNIVERSITY OF NEW YORK

THURLOW TERRACE

ALBANY, NEW YORK

(Emblem)

SECRETARY OF THE UNIVERSITY
J. LAWRENCE MURRAY

May 29, 1964

Dr. Peter Nicholls
State University of New York
at Buffalo
Department of Biochemistry
Capen Hall
The Circle
Buffalo 14, New York

Dear Dr. Nicholls:

This is written in the light of our conference in April, following my letter of March 20, in the hope that it may enable a resolution of the problem on both our parts. As we have sought to explain, the disqualification for employment imposed by the New York statutes and rules pursuant thereto is grounded on advocacy of the doctrine that the existing government should be overturned by force and violence. No disability is imposed on the basis of political belief or action by peaceful political process. Neither is there any restraint on full freedom of intellectual inquiry in the realm of political ideas. It is because of the element

of knowing and wilfull advocacy of violent overthrow that validity of the law as respects employees of the educational system of the state has been sustained by the Supreme Court of the United States under the Constitution.

The significance of Communist Party membership lies in the procedures of the Feinberg Law (Education Law §3022) for implementing Civil Service Law Section 105. The Regents were directed, after inquiry on notice and hearing, to list organizations found to be subversive in that they advocate that the government should be violently overthrown and membership in such organization was made *prima facie* evidence of disqualification. It is a rebuttable presumption. The statute has been construed as requiring knowledge of the unlawful purpose of the organization and full judicial hearing is accorded to one dismissed or found ineligible on such ground. The Communist Party of the State of New York and the Communist Party of the United States have been so listed.

[fol. 345] It was my understanding that you would be willing to sign the prescribed certificate if it were indicated that the portion relating to the Regents rules did not include the Commissioner of Education's memorandum, which is printed in the booklet containing the rules, and specified the organizations listed by the Regents. I am willing to accept a certificate with these additions inasmuch as the Commissioner's memorandum is not a part of the rules and the presumption attaches only to the listed organizations. A form of certificate in accordance therewith is enclosed. I hope that you will find it possible to execute this certificate so that the matter may be resolved.

Sincerely,

/s/ J. Lawrence Murray
Secretary and Acting
Chief Administrative Officer

[fol. 346]

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations are presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum, is part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... **Date** ..... **Signature**

[fol. 347]

EXHIBIT "11" TO STIPULATION OF FACT

STATE UNIVERSITY OF NEW YORK

ALBANY 1, N. Y.

OFFICE OF THE PRESIDENT

March 20, 1964

Dr. George Hochfield
State University of New York
Buffalo, New York

Dear Sir:

This is addressed to you as one of the few faculty members at the State University of New York at Buffalo having continuing or term appointments who have not yet complied with the procedures prescribed by the State University trustees to carry out their obligations under Section 105 of the Civil Service Law, as implemented by Section 3022 of the Education Law known as the Feinberg Law. It has been asserted that such non-compliance, in some cases at least, is based on disagreement as a matter of principle with the statutory provisions. Accordingly this is to explain the necessity and purpose of the prescribed procedure and why I must specifically direct you to comply with it.

Section 105 of the Civil Service Law (formerly Section 12-a) has since 1940 made ineligible for appointment or continuance in public employ in the State of New York any person who wilfully and deliberately advocates the overthrow of the government by force and violence or who organizes or becomes a member of any society or group which teaches or advocates the overthrow of government by such means. The Feinberg Law was specifically enacted in 1949 to provide appropriate means for enforcing this provision of the Civil Service Law with respect to the public schools, and was extended in 1953 to employees of public higher educational institutions. It provided that the Board of Regents should make a listing, after inquiry,

notice of hearing, of organizations found to be subversive as set forth in the Civil Service Law. On September 24, 1953 the Regents listed the Communist Party of the United States of America and the Communist Party of the State of New York as subversive pursuant to Section 3022 of the Education Law. Section 105 of the Civil Service Law was subsequently amended to make membership in these organizations *prima facie* evidence of disqualification for public employment in the State.

The constitutionality of both Section 105 of the Civil Service Law and of the Feinberg Law was sustained by the United States Supreme Court in *Adler* v. *Board of Education*, 342 U. S. 485. That case specifically upheld the right of the State to inquire into past or present association with organizations found to teach and advocate the overthrow of government by force and violence as bearing on fitness [fol. 348] for employment in the educational system. It was said that school authorities have the right and duty to screen officials, teachers and employees as to their fitness. A finding of membership does not automatically result in removal. That can only follow in proceedings appropriate to the tenure of the employee involved and any dismissal pursuant to Section 105 is by subdivision 2 of that section made subject to full judicial hearing in which the burden is on the removing official to sustain the validity of his order.

It will be seen, however, that the State University trustees, as the governing body of institutions of higher education owned and operated by the State, have a statutory duty not to appoint or continue in employment or to permit the appointment or continuance in employment of persons who knowingly support the purposes of organizations which teach and advocate the overthrow of government by force. In carrying out that duty they properly may and must inquire into association with organizations found to be subversive in order to determine qualification for employment. Any refusal by an employee to furnish information as to

his own affiliation with such organizations would constitute insubordination (*Matter of Adler* v. *Wilson*, 282 App. Div. 418, lv. to app. den. 306 N. Y. 981). With respect to faculty employees, whose qualifications are not certified by the Civil Service Department, appointees are asked to certify that they are not presently members of the Communist Party and that if they ever have been such members they have communicated that fact to the President of State University. This procedure has been followed as the most fair and forthright way of making inquiry regarding a qualification for appointment or retention fixed by law. It asks no more than that the employee himself recognize and establish such qualification and furnishes opportunity through conference with me to protect him from unfair or unwarranted implications from past association with an organization found to be subversive.

I must, therefore, hereby specifically direct you either to execute the certificate heretofore furnished to you or the attached certificate in compliance with its terms and deliver it to President Furnas or, if you cannot properly execute it, to place the matter before me in a personal conference. Your failure either to sign and deliver the certificate as directed or to request such conference with me within ten days after delivery of this letter to you will be deemed to be a wilful refusal to comply with my direction warranting the initiation of proceedings for your dismissal for such cause.

Sincerely,

/s/ J. LAWRENCE MURRAY
J. Lawrence Murray
Secretary of the University
an Acting Chief Administrative Officer

attachment

[fol. 349]

EXHIBIT "12" TO STIPULATION OF FACT

STATE UNIVERSITY OF NEW YORK

THURLOW TERRACE

ALBANY, NEW YORK

(Emblem)

SECRETARY OF THE UNIVERSITY
J. LAWRENCE MURRAY

May 28, 1964

Dr. Newton Garver
Department of Philosophy
State University of New York
at Buffalo
Diefendorf Hall
The Loop
Buffalo 14, New York

Dear Dr. Garver:

Your response of March 26, to my letter of March 20, enclosed a certificate acknowledging that Section 3022 of the Education Law and the rules promulgated under it are part of the terms of your employment by State University. You have, however, crossed out that part of the certificate relating to membership in the Communist Party. This, you indicate, is based on your unwillingness to testify as to the political or religious affiliations or beliefs of yourself or any other faculty member or to participate in any manner in the enforcement of the statute.

Let me first emphasize that the certificate asks nothing about anyone's religious beliefs or associations and asks nothing about the Communist Party affiliation of anyone but yourself. Secondly, as I have heretofore sought to explain, the disqualification for employment of Civil Service Law Section 105, as implemented by Education Law Section 3022, is grounded on deliberate advocacy of violent

and unlawful overthrow of government. Communist Party membership is made presumptive evidence of such disqualification because the Party after inquiry, on notice and hearing, has been found to advocate the doctrine that the government should be overthrown by force and violence. The test is not political belief, nor is there any inhibition on free intellectual inquiry in the realm of political ideas and theory.

[fol. 350] You express the hope that it was not the intention of my directive that you be required to participate in administration of the statute by executing the certificate in the form presented to you. It was necessary for me in the exercise of my own responsibilities, which I am duty bound to carry out, to direct that you either execute the certificate or communicate with me. You have not sought any interview with me, nor have you executed the certificate in compliance with its terms.

As I have indicated, the State statutes and regulations upon which I must act do not impose any disqualification either because of political beliefs or because of action by peaceful political process, nor do they limit full freedom of academic inquiry in the area of political ideas. It is only advocacy of the unlawful use of force and violence to destroy the existing government upon which disqualification is based. The statutory presumption of disqualification because of Communist Party membership has been upheld as a reasonable and valid inference by the Supreme Court of the United States. Hence it is necessary and proper to inquire about such membership in connection with employment by State University, which is the purpose of the certificate in question. Even such membership is, however, only *prima facie* evidence of disqualification and there is a statutory right to a full judicial hearing for anyone disqualified on subversive grounds. Unless you are now willing to execute and return the certificate on the basis of the explanation of its nature and purpose, I must accept your letter as a refusal to comply with the plain

terms of my direction of March 20 and submit the matter for initiation of dismissal proceedings based on such refusal.

Sincerely,

/s/ J. Lawrence Murray
Secretary and Acting
Chief Administrative Officer

[fol. 351]

Exhibit "13" to Statement of Fact

State University of New York

Thurlow Terrace

Albany, New York

(Emblem)

Secretary of the University
J. Lawrence Murray

May 29, 1964

Dr. Ralph N. Maud
Assistant Professor of English
State University of New York at Buffalo
Crosby Hall—Library Circle
Buffalo 14, New York

Dear Dr. Maud:

I had hoped at our interview in February and in my subsequent letter of March 20, to be able to make clear that the statutes and rules, with which the University must comply, do not impose any limitation on free intellectual inquiry or base any employment disability on political belief or action by peaceful political process in accordance with such belief. It is advocacy of the doctrine that the existing government should be overthrown by force and violence which constitutes disqualifying subversive activity under the law. Under the Feinberg Law the Communist

Party of the State of New York and the United States have been listed by the Regents, after notice and hearing, as organizations which advocate such unlawful overthrow of the government and membership therein is made *prima facie* evidence of disqualification by law. It must be a membership with knowledge of the unlawful purpose of the Party and the presumption is rebuttable with full judicial hearing provided for one disqualified on such ground. Both the statutory qualification and the presumption have been held valid by the United States Supreme Court under the Constitution.

Unhappily you have thus far refused to execute the certificate required by the University in accordance with its terms and my direction. As an administrative officer of the State University I could not, in good conscience, retain that position and fail to carry out the duties I am sworn to execute to the best of my ability. While you sought to confer with me before my letter of March 20, it was not for the purpose of communicating facts to me which would enable you to execute the certificate in accordance with the statements made therein but only to state your disagreement with the requirement. Unless, on the basis of our discussion and the explanations I have sought to make, you are willing to sign the certificate, I can only treat your letter of March 16 as confirmation of your refusal to comply with the direction and am left with no alternative but to submit the matter for initiation of dismissal proceedings based on such refusal.

Sincerely,

/s/ J. Lawrence Murray
Secretary and Acting Chief
Administrative Officer

[fol. 352]

EXHIBIT "14" TO STATEMENT OF FACT

STATE UNIVERSITY OF NEW YORK
THURLOW TERRACE
ALBANY, NEW YORK

(Emblem)

SECRETARY OF THE UNIVERSITY
J. LAWRENCE MURRAY

May 29, 1964

Mr. Harry Keyishian
Department of English
State University of New York
at Buffalo
Acheson 253
Buffalo 14, New York

Dear Mr. Keyishian:

I had hoped at our interview on April 7, following my letter of March 20, to be able to make clear that the statutes and rules, with which the University must comply, do not impose any limitation on free intellectual inquiry or base any employment disability on political belief or action by peaceful political process in accordance with such belief. It is advocacy of the doctrine that the existing government should be overthrown by force and violence which constitutes disqualifying subversive activity under the law. Under the Feinberg Law the Communist Party of the State of New York and the United States have been listed by the Regents, after notice and hearing, as organizations which advocate such unlawful overthrow of the government and membership therein is made *prima facie* evidence of disqualification by law. It must be a membership with knowledge of the unlawful purpose of the Party and the presumption is rebuttable with full judicial hearing provided

for one disqualified on such ground. Both the statutory qualification and the presumption have been held valid by the United States Supreme Court under the Constitution.

Unhappily you have thus far refused to execute the certificate required by the University in accordance with its terms and my direction. As an administrative officer of the State University I could not, in good conscience, retain that position and fail to carry out the duties I am sworn to execute to the best of my ability. While you sought a conference with me after my letter of March 20, it was not for the purpose of communicating facts to me which would enable you to execute the certificate in accordance with the statements made therein, but only to state your dis-
[fol. 353] agreement with the requirement. Unless on the basis of our discussion and the explanations I have sought to make you are willing to sign the certificate, I can only treat our conference as confirmation of your refusal to comply with the direction and am left with no alternative but to submit the matter for initiation of dismissal proceedings based on such refusal.

Sincerely,

/s/ J. Lawrence Murray
Secretary and Acting Chief
Administrative Officer

[fol. 354]

EXHIBIT "15" TO STATEMENT OF FACT

STATE UNIVERSITY OF NEW YORK
THURLOW TERRACE
ALBANY, NEW YORK

(Emblem)

SECRETARY OF THE UNIVERSITY
J. LAWRENCE MURRAY

May 29, 1964

Dr. George Hochfield
Associate Professor of English
State University of New York at Buffalo
Crosby Hall—Library Circle
Buffalo 14, New York

Dear Dr. Hochfield:

I had hoped at our interview on April 3, following my letter of March 20, to be able to make clear that the statutes and rules, with which the University must comply, do not impose any limitation on free intellectual inquiry or base any employment disability on political belief or action by peaceful political process in accordance with such belief. It is advocacy of the doctrine that the existing government should be overthrown by force and violence which constitutes disqualifying subversive activity under the law. Under the Feinberg Law the Communist Party of the State of New York and the United States have been listed by the Regents, after notice and hearing, as organizations which advocate such unlawful overthrow of the government and membership therein is made *prima facie* evidence of disqualification by law. It must be a membership with knowledge of the unlawful purpose of the Party and the presumption is rebuttable with full judicial hearing provided for one disqualified on such ground. Both the statutory quali-

fication and the presumption have been held valid by the United States Supreme Court under the Constitution.

Unhappily you have thus far refused to execute the certificate required by the University in accordance with its terms and my direction. As an administrative officer of the State University I could not, in good conscience, retain that position and fail to carry out the duties I am sworn to execute to the best of my ability. While you sought a conference with me after my letter of March 20, it was not for the purpose of communicating facts to me which would enable you to execute the certificate in accordance with the statements made therein, but only to state your disagreement with the requirement. Unless on the basis of our discussion and the explanations I have sought to make you are willing to sign the certificate, I can only treat our conference as confirmation of your refusal to comply with the direction and am left with no alternative but to submit the matter for initiation of dismissal proceedings based on such refusal.

Sincerely,

/s/ J. Lawrence Murray
Secretary and Acting Chief
Administrative Officer

[fol. 355]

EXHIBIT "16" TO STATEMENT OF FACT

College of Arts and Sciences
STATE UNIVERSITY OF
NEW YORK AT BUFFALO
Formerly
The University of Buffalo,
Founded 1846
Department of English

Crosby Hall
Library Circle
Buffalo, New York 14214
Telephone 831-2317
Area Code 716

2 June 1964

J. Lawrence Murray
Secretary and Acting Chief
Administrative Officer
State University of New York
Albany
New York

Dear Mr. Murray,

I received yesterday your letter of 29 May 1964.

I would like to correct the impression given by my letter of 26 March. In expressing my willingness to come to see you for another interview I considered that I had made a permissible response to your letter of March 20, and therefore have not been delinquent.

Further, I hear from Dr. Nicholls, with whom you have been in correspondence, that a new and proper Certificate has come into being. It seems unlikely that you can be considering dismissing a person for refusing to sign the old, improper Certificate.

Yours truly,

Ralph Maud
Assistant Professor of English

[Handwritten notation—Dick, you already have this, I believe.—Ralph]

[fol. 356]

EXHIBIT "17" TO STATEMENT OF FACT

STATE UNIVERSITY OF NEW YORK

THURLOW TERRACE

ALBANY, NEW YORK

(Emblem)

SECRETARY OF THE UNIVERSITY
J. LAWRENCE MURRAY

June 5, 1964

Dr. Ralph N. Maud
Assistant Professor of English
State University of New York at Buffalo
Crosby Hall—Library Circle
Buffalo 14, New York

Dear Dr. Maud:

This is in reply to your letter of June 2 which indicates that you feel the form of certificate signed by Dr. Nicholls is proper. In accepting a certificate from Dr. Nicholls with the additions proposed by him, I did so on the ground that the Commissioner of Education's memorandum printed in the booklet containing the Regents rules is not itself a part of the rules and the organizations specified are those listed by the Regents to which the presumption flowing from membership attaches. I am enclosing a certificate in such form for your signature which I will be happy to accept as compliance with the requirements I must carry out.

Sincerely,

/s/ J. LAWRENCE MURRAY
J. Lawrence Murray
Secretary and Acting Chief
Administrative Officer

[fol. 357]

EXHIBIT "18" TO STATEMENT OF FACT

EXHIBIT

Resolved that Resolution 65-100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56-98 adopted on October 11, 1956, incorporated into the Policies of the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded,* and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question

arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date.

[fol. 358] *Resolved* that any person presently employed or heretofore employed by the University who has failed to sign the certificate required by the Procedure on New Academic Appointments adopted on October 11, 1956, shall not be deemed disqualified or ineligible solely by reason of such failure, for appointment or reappointment in the professional service of the University in the manner provided in new Section 3 of Title B of Article XI of the Policies of the Board of Trustees as adopted by resolution this day; and

Further Resolved that any person presently employed by the University shall not be deemed ineligible or disqualified for continuance in his employment during the prescribed term thereof, nor be subject to charges of misconduct, solely by reason of such failure, provided he is found qualified for such continuance by the Chief Administrative officer of the institution at which he is employed in accordance with the procedures prescribed in said new Section 3 of Title B of Article XI of the Policies of the Board of Trustees.

[fol. 360] [File endorsement omitted]

[fol. 361]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action File No. 10,994

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK, Plaintiffs,

—v.—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK, Defendants.

Before: MOORE, U.S.C.J., BURKE, Ch.J. and HENDERSON, U.S.D.J.

OPINION—January 5, 1966

Appearances:

Richard Lipsitz, of Lipsitz, Green and Fahringer, Buffalo, New York (Rosario J. DiLorenzo on the brief), for plaintiffs.

John C. Crary, Jr. (Richard A. Foster and David L. Segal on the brief), for defendants Board of Trustees—State University of New York, State University of New York at Buffalo, Clifford C. Furnas, Samuel B. Gould, and J. Lawrence Murray.

Ruth Kessler Toch (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), for defendants Board of Regents of the University of the State of New

York, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk.

[fol. 362] MOORE, C.J.

This suit challenges the constitutionality of Sections 3021 and 3022 of the New York Education Law, Section 105 of the New York Civil Service Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the procedures used under these various statutes and regulations. Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law, as they are now in effect, are set forth in the margin.[1]

Section 244 of Article XVIII of the Rules of the Board of Regents, promulgated after the enactment of Section 3022 of the Education Law, provides that school authorities shall put into effect certain procedures for disqualification and removal of employees who violate Section 3021 of the Education Law or Section 105 of the Civil Service Law. Before appointment of an employee, the nominating official shall inquire of his former employers and of others whether he is known to have violated the statutory provisions, and no person found to have violated the statutes shall be eligible for employment. Each year school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership in an organization listed as subversive by the Board of Regents, indicating that the employee has violated the statutes. If there is such evidence, the reporting official [fol. 363] is to recommend the employee's dismissal, and within 90 days after the recommendation has been submitted, the school authorities must either prefer formal charges or reject the recommendation. If charges are preferred against persons serving on probation or having tenure, statutory dismissal procedures shall be followed. "In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities

shall conduct such hearings . . . as they deem the exigencies warrant, before taking final action on dismissal. In all cases, all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed."

The State University of New York at Buffalo, attempting to comply with the Regents' rules, distributed to all members of the academic staff a booklet containing the Regents' rules and the underlying statutes, and required each faculty member to sign a certificate (the "Feinberg certificate") declaring that he had read the Regents' rules; that the rules and the statutes cited therein constituted terms of his employment; and that he was not now a member of the Communist Party and if he ever had been, he had communicated that fact to the president of the university.

Four of the five plaintiffs in the present action—Keyish- [fol. 364] ian, Hochfield, Garver, and Maud, all under term appointments to the academic staff of the University—declined to sign the certificates, and were notified that if they did not sign as requested their terms would not be renewed on grounds of insubordination. Keyishian's term has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions. They have been informed that dismissal proceedings will not be started against them until the validity of the statutes, rules, and procedures is determined in the present suit. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university.

The fifth plaintiff, Starbuck, was appointed on September 1, 1963, to a one-year term as a specialist in acquisitions for the library. After starting work he was required to fill out a form, one question of which asked: "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated

the doctrine that the government of the United States or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means?" He refused to answer and was dismissed from his appointment on June 18, 1964.

On July 8, 1964, the plaintiffs brought a class action [fol. 365] against a large part of the educational hierarchy of the State of New York, seeking an injunction against enforcement of the civil statutes concerning employment of subversives and of the regulations and procedures used to implement those statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three-judge district court. 233 F. Supp. 752 (W.D. N.Y., 1964). The Court of Appeals for the Second Circuit reversed and directed that the case be heard before a three-judge court. 345 F. 2d 236 (2 Cir., 1965).

I. *The Constitutionality of the State's Objective.*

The plaintiffs argue in part that the complex of laws, regulations, and procedures under attack has no constitutionally valid objective—that they infringe upon freedom of expression without being justified by any legitimate state interest.

The Supreme Court in the *Adler* case, considering statutes the predecessors of the ones now in question, described the importance of the state interest in preventing the use of the educational system as a platform for urging students to overthrow government by violent means:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has [fol. 366] a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to main-

tain the integrity of the schools as a part of ordered society, cannot be doubted.

Adler v. *Board of Education*, 342 U.S. 485, 493 (1952).

The Supreme Court has not changed its recognition of the importance of this state interest in recent cases. In 1958, it quoted the above language from *Adler* with approval, in upholding the dismissal for "incompetency" of a Pennsylvania school teacher who refused to answer a question as to his activities in the Communist Party. *Beilan* v. *Board of Public Education*, 357 U.S. 399 (1958). In *Barenblatt* v. *United States*, 360 U.S. 109 (1959), the Court upheld the contempt conviction of a former teaching fellow at the University of Michigan, based on his refusal to answer questions of a congressional committee as to his past and present membership in the Communist party. The Court indicated that Congress had a legitimate interest in "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities . . . persons and groups committed to furthering the objective of overthrow." 360 U.S. at 129. In *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961), the Court struck down as unconstitutionally vague a Florida statute requiring state employees to swear that [fol. 367] they had never lent their "aid, support, advice, counsel, or influence to the Communist Party"; but the Court did not "question the power of a State to safeguard the public service from disloyalty." 368 U.S. at 288. Nor does the recent decision of *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), cast any doubt upon the power of a state to act to prevent the incitement of violent overthrow on university campuses.

The plaintiffs argue that the legitimate state objective recognized by the Court in *Adler* is not present here, since the teachers here hold positions at universities rather than at public schools. The argument appears to be based upon the comparative maturity of mind of the university stu-

dent, which entitles him to the privilege of exposure to conflicting political philosophies. But as the American Association of University Professors wrote in their amicus brief in *Barenblatt, supra,* a case involving a university teacher, "The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger situation, within which the interest in national self-preservation . . . also prominently appear[s]." Brief, p. 24. It would not be constitutional to prevent the *teaching* of Communist philosophy at the university level; but it would be dangerously anomalous to proscribe the *advocacy* of violent overthrow of govern-
[fol. 368] ment in all parts of the United States, see *Dennis* v. *United States,* 341 U.S. 494 (1951), except in the breeding-grounds of the future leaders of the nation. The interest in national self-preservation—"the ultimate value of any society," *Dennis* at 509—applies to the university campus as well as to the rest of our society.

II. *The Constitutionality of the Means Used to Attain the State's Objective.*

The plaintiffs maintain that even if the statutes and regulations under attack assert a legitimate state objective, they do so in a manner which unduly restricts other interests protected by the Constitution. The plaintiffs invoke a variety of constitutional clauses in support of their position.

A. *The Ex Post Facto Clause.*

An ex post facto law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* v. *Missouri,* 71 U.S. 277, 325-26 (1867).

In the present case, the plaintiffs either have been dismissed or are threatened with dismissal for failure to

answer questions put to them under procedures designed to implement §3022 of the Education Law, which was made applicable to colleges in 1953. Before being dis- [fol. 369] missed or threatened with dismissal, the plaintiffs were repeatedly told the purpose of the questions, the statutory basis for the questions, and the possibility that dismissal proceedings would be started if they failed to answer the questions. The proscription of their conduct preceded the conduct itself, so that the ex post facto clause does not apply. See *Garner* v. *Board of Public Works*, 341 U.S. 716, 721 (1951), in which the Court rejected an argument that dismissal of municipal employees for failure to take an oath was ex post facto punishment, with the observation that the activity covered by the oath had been proscribed years before the employees were asked to take the oath.

B. *The Bill of Attainder Clause.*

"Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment of them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett*, 328 U.S. 303, 315-16 (1946). The plaintiffs contend that Section 3022 of the Education Law, coupled with the Regents' regulations under that section and Section 105(1)(c) of the Civil Service Law, constitute a bill of attainder, since these provisions single out as ineligible for employment in state schools members of the Communist Party of New [fol. 370] York and of the Communist Party of the United States. A similar argument was made and rejected in the *Adler* case.

The plaintiffs put particular reliance on *United States* v. *Brown*, 381 U.S. 437 (1965), in which the Court held unconstitutional as a bill of attainder a statute making it criminal for anyone "who is or has been a member of the Communist Party" to serve as an officer of a labor

union within five years of the termination of his membership in the Communist Party. However, the statute attacked in the *Brown* case differs fundamentally from the statutes and regulations challenged here in the nature of the part played by the legislature in determining the underlying facts from which adverse consequences would follow. Assuming without deciding that dismissal from state employment can constitute "punishment"—a question left open in *Garner*, 241 U.S. 716 at 721 (1951) and not touched upon in *Brown*—the bill of attainder clause only forbids "punishment" imposed by a legislature as a result of "trial by legislature." *Brown*, 381 U.S. at 442. It is the unfairness of trial by a large body "peculiarly susceptible to popular clamor," 1 Cooley, Constitutional Limitations, 536-37 (8th ed. 1927) that underlies the bill of attainder clause. The court in *Brown* faced a statute involving just such a "trial by legislature"—a statute which specified the Communist Party by name, and made it a crime—automatically and incontestably—for a Party member to hold union office.

[fol. 371] In the present case, disqualification from employment in the state schools did not follow automatically from a legislative determination that the Communist Party was a bad organization. Section 3022 of the Education Law provided that the Board of Regents shall, after full notice and hearing, make a list of organizations which it finds advocate the doctrine that government should be overthrown by force, violence, or other unlawful means. It was only after extensive hearings that the Board of Regents lists two organizations under Section 3022; the Communist Party of New York and the Communist Party of the United States. These determinations were subject to judicial review under Article 78 of the Civil Practice Act, now Article 78 of the Civil Practice Law and Rules. *Thompson* v. *Wallin*, 301 N.Y. 476, 493, 95 N.E. 2d 806, (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U.S. 485 (1952).

Section 105(1)(c) of the Civil Service Law, which makes membership in either the Communist Party of New York

or that of the United States "prima facie evidence" of disqualification for the state civil service, was based not on an original determination by the state legislature of the aims of the Communist Party, but upon the findings of the Board of Regents under Section 3022 of the Education Law. The preamble to the amendment incorporating the reference to the two parties makes clear that the purpose of the reference was to bring Section 105 into harmony with the [fol. 372] determinations of the Board of Regents under Section 3022. N.Y. Sess. Laws 1958, c. 503, §1.[3]

Again unlike the statute struck down in *Brown*, Sections 105(1)(c) of the Civil Service Law and 3022 of the Education Law make membership in the Communist Party only "prima facie evidence of disqualification" from state employment. The presumption is rebuttable; at a hearing, the employee "may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy." *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N.Y.S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N.Y. 476, 95 N.E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U.S. 485 (1952). As the New York Court of Appeals stated in *Thompson* v. *Wallin*:

> The phrase "prima facie evidence of disqualification" . . . imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the prima facie evidence. . . . Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence.

301 N.Y. 476 at 494, 95 N.E. 2d 806 at 814-15. See also *Hughes* v. *Board of Higher Education*, 309 N.Y. 319, 130 N.E. 2d 638 (1955).

[fol. 373] The disqualification of a teacher under these laws, in short, is not the result of a "legislative trial". The legislature in the first instance—in enacting Section 3022 of the Education Law—did nothing more than, in the language of *Brown*, 381 U.S. at 450, "set forth a generally applicable rule" as to the characteristics of organizations, membership in which should be evidence of disqualification. The determination of what organizations possessed those characteristics was left to an administrative body, to be made after notice, hearing, and opportunity for judicial review. The case closely resembles *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961), in which the Court, holding that the Subversive Activities Control Act of 1950 was not a bill of attainder, stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities," 367 U.S. at 84-85, and pointed out that the initial findings under the Act "must be made after full administrative hearing, subject to judicial review. . . . " *Id.* at 87.

If anything, the statutes now under attack are less like a bill of attainder than the act held constitutional in *Communist Party* v. *Subversive Activities Control Board*, since the New York statutes provide opportunity for hearing and [fol. 374] judicial review not only for the organizations listed, but also for their members. In short, in terms of a recent analysis of the history and purpose of the bill of attainder clause, the New York legislature here laid down "rules of general applicability", leaving "the job of application to other tribunals." Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330, 347, 350 (1962).

C. *The Due Process Clause.*

Plaintiffs' principal challenge to the New York statutes and procedures is based on the protection afforded to free

speech by the First Amendment, applicable to the states under the Fourteenth Amendment. Plaintiffs maintain that the New York laws and procedures impinge upon the rights of freedom of speech, thought, and expression more than is necessary to protect the state from violent overthrow, both by being too broad and vague, and by imposing an unfair burden on those who may be adversely affected, requiring them to justify their conduct.

1. *Procedural Due Process and Speiser* v. *Randall.*

Plaintiffs' "burden of justification" argument rests in large part on *Speiser* v. *Randall,* 357 U.S. 513 (1958), in which the Court held to be against due process a California statute which required veterans to file oaths declaring that [fol. 375] they did not advocate the overthrow of government by force, violence, or other unlawful means, before they could receive a state tax exemption. The essence of the Court's opinion was that by putting the burden of taking the first step and of proving eligibility on the applicants, the statute made it more likely that the exemption would be denied in borderline cases, and therefore that "legitimate utterance will be penalized." 357 U.S. at 526. The Court distinguished the *Garner* and *Douds* cases, in which oaths were upheld as valid prerequisites to state employment and union office, by pointing out that those cases "concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety," *id.* at 527, and that in those cases persons by taking the oaths could retain their positions subject to further proceedings in which the government would have the burden of proof. The Court also distinguished the New York statutes upheld in *Adler,* on the grounds that under those statutes "public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence." 357 U.S. at 528 n.8.

Later decisions have made clear that *Speiser* does not create a rule of law that a potential suspect in an area [fol. 376] concerning freedom of speech must never be called upon to justify his conduct. *E.g., Nelson* v. *County of Los Angeles,* 362 U.S. 1 (1960), upholding discharges of county employees based upon their refusal to answer questions concerning subversive activities put to them by a congressional subcommittee; *Konigsberg* v. *State Bar,* 366 U.S. 36 (1961) and *In re Anastaplo,* 366 U.S. 82 (1961), holding that admission to a state bar could be denied on the basis of an applicant's refusal to answer questions concerning Communist activities. Instead, *Speiser* holds that in a case concerning First Amendment freedoms, the burden of proof must rest upon the attacker as much as possible, consonant with the protection of the legitimate interest asserted by the attacker.

In the present case, the university requirement that all teachers sign "Feinberg certificates" may have raised problems under *Speiser,* although apparently the teachers could retain their positions by signing the certificates, subject only to further proceedings in which the state would bear the burden of proof. But the university has discontinued its reliance on the certificate procedure, as of June 10, 1965. The state now investigates prospective appointees by asking the candidate and others questions concerning his compliance with the laws. The candidate is given a chance to explain his doubts, not provided under the certificate procedure. Absolute refusal to answer is made grounds for [fol. 377] refusal to appoint; but this seems reasonable, in light of the opportunity to explain. Persons employed before June 10, 1965, shall not be deemed disqualified "solely by reason of" their failure to sign the Feinberg certificate. The State thus would have the burden of showing violations of the statutes, following the statutory procedures for dismissal as to teachers with tenure.

Plaintiffs maintain that teachers serving on contract and without tenure are denied procedural due process,

since they are guaranteed by the Regents' regulations only "such hearings . . . as [the school authorities] deem the exigencies warrant. . . . " In particular, plaintiffs point to the dismissal of Starbuck as evidence that the state will not give an adequate hearing to teachers without tenure.

It appears that after Starbuck failed to answer the question about subversive activities on his employment form, he was told that he must answer it yes or no, and could explain if he answered yes. He did not answer, and was dismissed. We understand the law of New York to be in [fol. 378] accordance with the advice given to Starbuck by the university officials. Although a teacher without tenure, Starbuck would have had an opportunity to explain and a right to a full hearing on whether or not he had violated the substantive provisions of the law, if he had answered the question yes. *Hughes* v. *Board of Higher Education*, 309 N.Y. 319, 130 N.E. 2d 638 (1955); *Lederman* v. *Board of Education*, 276 App. Div. 527, 96 N.Y.S. 2d 466 (2d Dep't 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N.Y. 476, 95 N.E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U. S. 485 (1952). In light of this opportunity for explanation and a hearing, Starbuck cannot complain of lack of procedural due process. His dismissal was for insubordination in refusing to answer a relevant inquiry, and the Constitution does not require any hearing on one's reasons for refusal to cooperate with a relevant inquiry. See *Nelson* v. *County of Los Angeles*, 362 U.S. 1 (1960); *Konigsberg* v. *State Bar*, 366 U.S. 36 (1961); and *In re Anastaplo*, 366 U.S. 82 (1961). *Slochower* v. *Board of Education*, 350 U.S. 551 (1956) may be distinguished, since in that case the Court found no necessary [fol. 379] connection between Slochower's refusal to answer questions concerning activities twelve years before, put to him not by a school board but by a congressional committee, and his unfitness for service in the New York schools. Here Starbuck refused to answer a question put to him by school authorities concerning whether or not

he presently advocated the violent overthrow of government.

Plaintiffs also assert that the provisions of Section 3022 of the Education Law and Section 105(1) of the Civil Service Law which make membership in the Communist Party prima facie evidence of disqualification for employment by the state are contrary to procedural due process. The same argument was before the Supreme Court in *Adler*, and the Court decisively rejected it:

> Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that "generality of experience" points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has a full opportunity to rebut it. . . . Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied.

342 U.S. 485, 494-96 (1952).

[fol. 380] In support of its position, the Court looked to the interpretation of the statute by the New York courts below. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N.Y.S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, *supra*, 806, 815 (1950). The courts of New York not having changed their interpretation of the presumption contained in these statutes, see *Hughes* v. *Board of Higher Education*, 309 N.Y. 319, 130 N.E. 2d 638 (1955), there is no reason to hold the presumption violative of due process today.

2. *"Vagueness"*

The plaintiffs maintain that breadth of language renders the statutes under attack unconstitutional, because it tends to deter legitimate expression as well as expression which the State is justified in regulating. It is, of course, true that strict standards of draftsmanship are to be applied to a statute having a potentially inhibiting effect on speech; "a man may be the less required to act as his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147, 151 (1959). However, we must examine the present statutory complex, as implemented by the Regents' regulations and as interpreted by the New York courts, to see whether it has a tendency to deter legitimate discussion and activities as well as to [fol. 381] carry out the permissible objective of preventing the advocacy of violent overthrow of government.

Subsection 2 of Section 3022 of the Education Law provides that the Board of Regents shall list organizations found to "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown . . . by force" or found to "advocate, advise, teach, or embrace the duty, necessity, or propriety of adopting any such doctrine. . . ." Section 105(1) of the Civil Service Law lists three causes for ineligibility for employment in the state civil service; wilfully advocating, advising, or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine.

Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should "be overthrown . . . by force" is a basis for adverse consequences under these sections. Not innocent membership in the Communist Party, in contrast to

what could have been deterred by the oath struck down in *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); only knowing membership in an organization advocating the violent over-[fol. 382] throw of government is grounds for ineligibility for state employment. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N.Y.S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N.Y. 476, 95 N.E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U.S. 485 (1952); see also *Adler* v. *Wilson*, 282 App. Div. 418, 123 N.Y.S. 2d 655 (3d Dept. 1953).

Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the "duty, necessity, or propriety" of adopting the doctrine of violent overthrow, before he can be disqualified from state employment. Finally, the sections just described do not deter representing the Communist Party in a lawsuit, or defending the constitutional rights of the Communist Party in a newspaper article, or voting for a candidate also supported by the Communist Party—the legitimate activities which the Supreme Court feared might be deterred by the broad oaths struck down in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961) (state employees had to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party") and in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) (state teachers had to swear, among other things, that they did not aid any person to aid in [fol. 383] the commission of any act intended to alter the constitutional form of government by force or violence).

The Supreme Court in *Baggett* made clear that narrowly drawn statutes aimed wholly at the control of subversive activities would be upheld as constitutional. The Court distinguished the broad oath before it in *Baggett* from the oath upheld in *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (1951), on the grounds that the *Gerende* oath required a candidate for state office to swear only that he is not engaged "in one way or another in the attempt to overthrow

the government by force or violence," and that he is not knowingly a member of an organization engaged in such an attempt. The sections of the New York statutes just analyzed proscribe no more than the oath upheld in *Gerende*, and seem less questionable even than *Gerende* since they place the burden of taking the first step and the burden of proof on the official challenging eligibility. The Supreme Court upheld these sections, 3022 of the Education Law and 105(1) and (2) of the Civil Service Law (the last two subsections then being known as 12(a) of the Civil Service Law), in *Adler* v. *Board of Education*, 342 U.S. 485 (1952), although the sections were attacked on grounds of vagueness at that time. We see no reason to change the result of that case.

The remaining sections of the statutes under attack seem at first glance more general. Section 3021 of the Education [fol. 384] Law provides for the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" while employed in the school system. Section 105(3) of the Civil Service Law provides for the removal of civil servants from office for "treasonable or seditious" words or acts.

However, the 1958 amendments to section 105(3) greatly restricted the scope of that subsection. N.Y. Sess. Laws 1958, ch. 790, sec. 105. "Treasonable words or acts", for the purpose of 105(3), now must come within the definition of "treason" in Section 2380 of the Penal Law:

> "1. Levying war against the people of the state within this state; or, 2. A combination of two or more persons by force to usurp the government of the state or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or, 3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed by the constitution of the United States, as giving to such enemies aid and comfort within the state or elsewhere."

We do not understand the plaintiffs to challenge this definition of treason on grounds of vagueness; it is as good as can be done, and resembles the definition used in Article III, section 3, of the Federal Constitution. Even the third clause of the New York definition is narrow, having been [fol. 385] construed to apply only in wars against foreign enemies waged by the State of New York separately from the United States. *People* v. *Lynch*, 11 Johns, R. 549 (1814).

Similarly, "seditious acts and utterances", for the purpose of section 105(3), now must come within the definition of "criminal anarchy" in section 160 of the Penal Law:

> "the doctrine that organized government should be overthrown by force or violence or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."

This is a definition closely connected with the state's legitimate interest in self-preservation, and as such is within the realm of the constitutional under *Gerende*, *Cramp*, and *Baggett*. We note in passing that the 1958 amendment to section 105(3) refers to section 160 of the Penal Law, entitled "Criminal anarchy defined". The looser language of section 161 of the Penal Law, entitled "Advocacy of criminal anarchy", is not now before us, although the plaintiffs seem to wish that it were.

The 1958 amendments of section 105(3) did not, by their terms, extend to the parallel language of section 3021. But the history of the two sections—born as successive sections of an act of 1917, N.Y. Sess. Laws 1917, ch. 416, secs. 2 and 3—together with the identity of language in the two sections, [fol. 386] indicates that the two must be construed *in pari materia*. The presumption that statutes "will be construed in such a way as to avoid the constitutional question presented", *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964), reinforces us in the conclusion that the words "seditious or treasonable acts or words" in section 3021, like their identical twins in section 105(3), must be defined by reference to sections 2380 and 160 of the Penal Law. When this is done,

sections 3021 and 105(3)—like the separable but related Sections 3022 and 105(1) and (2)—become sharply defined, and can withstand any possible attack on grounds of vagueness.

III. *Conclusion.*

We find constitutional section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents, and the procedures under these statutes and rules now in effect at the State University of New York at Buffalo. We accordingly give judgment for the defendants, and deny the plaintiffs all the relief requested by them.

[fol. 387]

FOOTNOTES

[1] *Civil Service Law*

§105. *Subversive activities: disqualification.*

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purpose of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

[fol. 388]

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

Education Law

§3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.*

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the

state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

[fol. 389]

§3022. *Elimination of subversive persons from the public school system.*

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members *and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof* who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

[fol. 390]

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require com-

pliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Section 12-a of the Civil Service Law, referred to in Section 3022 of the Education Law, now appears as Section 105(1) and (2) of the Civil Service Law, N.Y. Sess. Laws 1958, ch. 790, §105.

[2] The text of the preamble is as follows:

"*Declaration of legislative intent.*

The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law [now Section 105 of the Civil Service Law] with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list

'organizations which it finds to be subversive in that they advocate, advise teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law';

that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that

[fol. 391]

pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute prima facie evidence of disqualification for appointment or continued employment."

Leonard P. Moore, U.S.C.J.

Harold P. Burke, Ch. J., U.S.D.C.

John O. Henderson, U.S.D.J.

January 5th, 1966.

[fol. 392]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action File No. 10,994

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE and ALEXANDER A. FALK.

JUDGMENT—January 5, 1966

This action came on for hearing before the Court, Honorable Leonard P. Moore, U.S.C.J., Harold P. Burke and John O. Henderson, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be granted in favor of the defendants and denying the plaintiffs all relief requested by them.

Dated at Buffalo, New York, this 5th day of January, 1966.

Roland E. Logel, Clerk of Court.

[File endorsement omitted]

[fol. 393]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 10,994

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK, Plaintiffs,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 14, 1966

I. Notice is hereby given that Harry Keyishian, George Hochfield, Newton Garver, Ralph N. Maud, and George E. Starbuck, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the judgment dismissing the complaint and the order denying plaintiffs' request for all relief, entered in this action on January 5, 1966.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

1. Complaint of plaintiffs herein.

2. Answers in Opposition by the State Attorney General and the University of the State of New York.

[fol. 394] 3. Stipulation of Fact and exhibits thereto.

4. The order and/or judgment dismissing complaint and denying relief.

5. Decision of January 5, 1966.

III. The following questions are presented by this appeal:

1. Whether the New York statutory complex, together with the administrative regulations, rules, and certificates, unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment freedoms.

2. Whether the New York statutory complex involved, together with the administrative rules, regulations, procedures and certificates unconstitutionally deprive plaintiffs of due process of law.

3. Whether the New York statutory complex involved, together with the administrative rules, procedures and certificates constitute a bill of attainder.

4. Whether the statutory complex involved, together with the rules, procedures, regulations and certificates constitute an ex post facto enactment.

Dated: February 14, 1966.

Lipsitz, Green, Fahringer, Roll, Schuller and James (former Lipsitz, Green & Fahringer), By Richard Lipsitz, Attorneys for Plaintiffs, Office & Post Office Address, One Niagara Square, Buffalo, New York 14202.

[fol. 395] To:

Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Attorney for Defendants Board of Regents of the University of the State of New York, Arthur Levitt, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone and Alexander A. Falk, The Capitol, Albany, New York.

John C. Crary, Jr., Esq., Attorney for Defendants Board of Trustees of the State University of New York; State University of New York at Buffalo, Clifford C. Furnas; Samuel B. Gould and J. Lawrence Murray, Thurlow Terrace, Albany, New York.

[fol. 396] Proof of Service (omitted in printing).

[fol. 398] [File endorsement omitted]

[fol. 399] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 400]

SUPREME COURT OF THE UNITED STATES

No. 1226, October Term, 1965

HARRY KEYISHIAN, et al., Appellants,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al.

ORDER NOTING PROBABLE JURISDICTION—June 20, 1966

Appeal from the United States District Court for the Western District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

SUPREME COURT U.S.
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1965~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

APPELLANT'S STATEMENT AS TO JURISDICTION

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ROSARIO J. DILORENZO, with
RICHARD LIPSITZ, on the Statement.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

APPELLANT'S STATEMENT AS TO JURISDICTION

Appellants' appeal from the final judgment of the United States District Court for the Western District of New York entered on the 5th day of January, 1966, holding that Section 105 of the New York State Civil Service Law, Sections 3021 and 3022 of the New York State Education Law, and

Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the Administrative Regulations and Procedures used thereunder are constitutional, and appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The unanimous opinion of the United States District Court for the Western District of New York was rendered on January 5, 1966, is not yet officially reported and is set out in the Appendix, *infra*, at pages 48-70. The opinions of the Circuit Court of Appeals, reported in 345 F. 2d 236 (2d Cir., 1965) and the District Court, reported in 233 F. Supp. 752 (W. D. N. Y., 1964), are set out in the Appendix, *infra*, at pages 53, 54.

Jurisdiction

This class action was instituted on July 8, 1964 under Section 1 of the Fourteenth Amendment to the Constitution of the United States, as that Amendment exists independently of the First Amendment and as that Amendment incorporates the First and Fifth Amendments; further, under Article 1, Section 10, Clause 1 and Article 6, Clause 2 of the Constitution of the United States, and further, under Section 1343 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code, to pass on the constitutionality of Sections 3021 and 3022 of the New York State Education Law, Section 105 of the New York Civil Service Law, Section 244, Article XVIII of the Rules of the Board of Regents of the State of New York, and the certificates required thereunder to enjoin the appellees, each of whom is either an official body

or officer of the State of New York, from enforcing the rules and statutes complained of.

By decision filed on January 5, 1966, the District Court gave judgment for the appellees and denied all relief requested by appellants. Notice of appeal was filed in the District Court for the Western District of New York on February 14, 1966. Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Baggett v. Bullitt,* 377 U. S. 360; *Shelton v. Tucker,* 364 U. S. 479; *Florida Lime and Avocado Growers, Inc. v. Jacobsen,* 362 U. S. 73. And see, *Sweezy v. New Hampshire,* 354 U. S. 234; *Speiser v. Randall,* 357 U. S. 513 and *Cramp v. Florida,* 368 U. S. 278.

Statutes, Administrative Rules and Certificates Involved

The provisions of law involved in this case are: Section 105 of the New York State Civil Service Law, Sections 3021 and 3022 of the New York State Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, Sections 160 and 161 of the New York State Penal Law, and Feinberg Certificates, Forms A and B. Because of their length, the texts of these provisions and the certificates involved are set out in the Appendix to this statement, *infra,* pages 49, 50, 51, 87, 89.

Questions Presented

1. Whether the New York statutory complex, together with the administrative regulations, rules and certificates, unconstitutionally condition public employment of teachers

and scholars at the university level in contravention of First Amendment freedoms.

2. Whether the New York statutory complex involved, together with the administrative rules, regulations, procedures and certificates, unconstitutionally deprive appellants of due process of law.

3. Whether the New York statutory complex involved, together with the administrative rules, procedures and certificates, constitute a bill of attainder.

4. Whether the statutory complex involved, together with the rules, procedures and regulations and certificates, constitute an *ex post facto* enactment.

Statement

This suit challenges the constitutionality of Section 105 of the New York State Civil Service Law and the statutes incorporated by reference therein, Sections 3021 and 3022 of the New York Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York (hereinafter referred to as the Regents Rules), and the certificates and procedures used under the various statutes and rules.

On March 31, 1949, the governor of the State of New York approved Chapter 360, Laws, 1949, being "an act to amend the Education Law in relation to eliminating from the public schools superintendents, teachers and employees who are members of subversive organizations", popularly known as the Feinberg Law. The law added a new section to the Education Law (Section 3022), the first subdivision of which directed the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system on

any of the grounds set forth in former Section 12-a of the Civil Service Law (now Section 105) and Section 3021 of the Education Law. The second subdivision of the section further provides that the Board of Regents shall, after inquiry, make a listing of organizations which it finds to be subversive on the various grounds set out in former Section 12-a (now 105) of the Civil Service Law and to provide that membership in such organizations is *prima facie* evidence of disqualification for employment or retention in any office or position in the public schools of the state.

On July 15, 1949, Article XVIII, Section 244 of the Rules of the Board of Regents, entitled "Subversive Activities", was adopted by the Board of Regents in pursuance to the provisions of the Feinberg Law. These Rules provide, in effect, that the school authorities shall put into effect certain procedures for the disqualification and removal of employees who violate Section 3021 of the Education Law or former Section 12-a (now 105) of the Civil Service Law. In essence, the Rules provide that prior to appointment of any employee, the nominating official shall inquire of his former employers and others whether he is known to have violated the statutory provisions involved and no persons found to have violated the said statutory provisions shall be eligible for employment. Each year the school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership, in an organization listed as subversive by the Board of Regents, or any evidence indicating that the employee has violated the statutes involved. If there is found to be such evidence, the reporting official shall recommend the employee's dismissal and within ninety days thereafter, the school authorities must either prefer formal charges or reject the recommendation. In cases where the school authorities find that in their judgment the evidence indicates a violation of

the statutory provisions, they shall immediately commence dismissal proceedings.

In 1953, by virtue of an extremely significant amendment to Section 3022 of the Education Law (New York Laws, 1953, Ch. 681), the applicability of the entire complex of laws was extended to include not only the public schools, but institutions of higher learning, including hundreds of educators in the State University system as well. In retrospect, it can be observed that this amendment set the stage for the present suit. In September 1953, pursuant to Section 3022, the Regents listed the Communist Party of the State of New York and the Communist Party of the United States as proscribed organizations, and on May 10, 1956, an *Ad Hoc* Committee of the Board of Trustees of the State University of New York established the so-called Feinberg Certificate (see Appendix, *infra*, pages 87, 88, for original form, as well Appendix, *infra*, pages 88, 89, for modified version). The Feinberg Certificate, in essence, declares that the subscriber has read the Regents Rules, that the Regents Rules and statutes cited therein constitute the terms of his employment and that he is not now a member of the Communist Party and if he had ever been a member, he has communicated that fact to the president of the university. These certificates were apparently circulated throughout the State University system and refusal to subscribe to the certificate was made a ground for dismissal on grounds of insubordination. With respect to the certificate, it should be emphasized that it is duality. In effect, it makes inquiry into past and present associations, but even more importantly, it requires an employee or prospective employee to consent that certain offensive statutes shall form a part of his contract of employment. This aspect of the case will be further elaborated upon in the argument below.

In 1958, Section 12-a of the Civil Service Law was amended and renumbered Section 105 (New York Laws, 1958, Ch. 790). The amendment (Civil Service Law, Section 105(3)), with its references to the Penal Law, raises a question as to the effect of Sections 160 and 161 of the New York Penal Law on all the provisions here involved. Further, in 1958, a new section was added to Section 12-a (c) (New York Laws, 1958, Ch. 503), naming the Communist Party of the United States and the Communist Party of New York as proscribed organizations, thus bringing into focus the question as to whether the complex here involved is a bill of attainder.

Prior to 1962, the University of Buffalo was a private institution. However, on April 30, 1962, the University of Buffalo was merged into the State University system of the State of New York. Sometime thereafter, all members of the academic staff of the State University of New York at Buffalo were required to sign the certificate known as the Trustees Certificate (also popularly known as the Feinberg Certificate) previously alluded to as a condition of their continued employment.

Plaintiffs Keyishian, Hochfield, Garver and Maud, all under differing term appointments to the academic staff at the State University of New York at Buffalo, declined to sign the Trustees Certificate. These plaintiffs were subsequently notified that due to their failure to sign, dismissal proceedings were being undertaken against them on the grounds of insubordination. Plaintiffs were further notified that their terms would not be renewed if they did not sign the certificate as requested. The term of plaintiff Keyishian has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions.

They have been informed that dismissal proceedings will not be started against them until the validity of the statutes, rules, and procedures here involved is determined. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university. Plaintiff Starbuck was appointed by the State University of New York at Buffalo on September 1, 1963 under a one-year contract as a specialist in acquisitions, and, in addition, in January 1964 was appointed as a lecturer in English. Subsequent to the former appointment, Mr. Starbuck was required to swear to the following question:

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

Appellant Starbuck declined to answer this question and as a result, was dismissed from his appointment on June 18, 1964.

On July 8, 1964, appellants commenced the present class action in the United States District Court for the Western District of New York seeking an injunction against the enforcement of the statutes involved in this case and of the regulations and procedures used to implement these statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three judge district court. 233 F. Supp. 752 (W. D. N. Y., 1964) (see Appendix, *infra*, page 53). An appeal was taken to the United States Court of Appeals for the Second Circuit which Court reversed and directed that the case be heard before a three judge court. 345 F. 2d 236 (2d Cir., 1965) (Appendix, *infra*, page 53). The Court noted that Civil Service Law, Section 105(3)

had been added since *Adler v. Board of Education*, 342 U. S. 485, and observed that there was a significant similarity between the laws in question here and those held unconstitutional in *Baggett v. Bullitt*, 377 U. S. 360. It called attention to the statement in *Weiman v. Updegraff*, 344 U. S. 183, 192, that public employment may not be denied on "patently arbitrary or unreasonable" grounds. Judge Marshall, in speaking of the *Adler* opinion, also stated that it had held Section 3022 not unconstitutional as applied to teachers in the public schools of New York, but had refused to pass upon the constitutionality of Section 3021 and had not considered the application of 3022 to university faculty.

On June 10, 1965, one week before the argument to the three judge court, the Board of Trustees of the State University of New York unanimously adopted certain resolutions (Appendix, *infra*, page 63) which in effect declared that it would no longer be State policy to require as a condition for employment, the execution of the certificates of the type referred to as A and B (Appendix, *infra*, pages 87-89). New procedures for appointments were instituted. These new procedures provide essentially that Section 105 of the New York Civil Service Law and Sections 3021 and 3022 of the New York Education Law and the Rules of the Board of Regents still constitute the terms and conditions for employment or retention in employment of any teacher or scholar. Furthermore, the resolution provide that anyone engaged prior to the effective date of the resolution shall not be deemed ineligible for employment "solely" by reason of his failure to sign the certificates involved. Thus, in addition to providing that certain offensive statutes are still part of the professors' contract terms, the resolutions maintained the constitutional issues raised by the certificates as well.

On June 16, 1965, a three judge district court, sitting in the Western District of New York, heard arguments on the merits in this case and on January 5, 1966, the same Court rendered a decision and order denying all the relief requested by the appellants (Appendix, *infra*, page 70). Thereafter, and on February 14, 1966, the appellants filed in the Federal District Court for the Western District of New York, a notice of appeal to the United States Supreme Court, thus bringing this case to its present posture.

ARGUMENT

Substantial and Important Questions are presented.

A. The question as to whether the New York statutory complex, together with the administrative regulations, rules and certificates, unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment freedoms.

This case presents the issue of freedom of speech and association in one of its most significant and sensitive aspects—the area of academic freedom. The appellants involved here, as well as hundreds of educators in the New York State University system have been required to consent that certain offensive statutes shall form a part of their employment and contract terms. A failure to so consent is made grounds for removal from university teaching positions throughout the state. Thus, the State of New York has threatened its educators with a punishment uniquely suited to mute protest and bring about doctrinal conformity. When one considers the years invested in acquiring the knowledge and skills necessary to teach at a university level with the fact of the rapid as-

similation of private universities into an ever growing public university, loss of an opportunity to teach can be seen to amount to a practical inability to follow one's profession. On a university level, a sense of freedom is crucial if the frontiers of knowledge are to be enlarged. The importance of unimpeded thought and the right of exploration for teachers, unhampered by state harrassment, far exceeds that of any other professional vocation. This Court has fully recognized the importance of this special interest.

In *Sweezy v. New Hampshire,* 354 U. S. 234, four members of the Supreme Court held the view that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in our democracy that is played by those who guide and train our youth. To impose any straitjacket upon intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few if any principles are accepted as absolute. Scholarships cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (*Sweezy, supra,* at p. 250).

The *Sweezy* case recognizes, therefore, the vital importance of academic liberty. Its preservation is deemed fundamental to our society.

While it is clear that the Supreme Court is now committed to carefully safeguarding academic freedom, the Court has, on the other hand, never suggested that a state may not lay down reasonable terms of employment for its teachers and professors. That which constitutes

reasonableness is such a case, however, has been reexamined and modified as the importance of academic freedom has received fuller judicial recognition its opposing considerations necessarily have been forced to give away. See generally, Murphy, Academic Freedom—An Emerging Constitutional Right, 28 Law and Contemporary Problems 447 (1963).

In a series of cases, decided by a closely divided court, the Supreme Court of the United States has upheld the power of the state to inquire into an employee's associations with allegedly subversive organizations as relevant to the employee's qualifications and fitness for public employment. It has for example, upheld the discharge of municipal employees who refuse to take a statutory required disclaimer oath, *Garner v. Los Angeles,* 341 U. S. 716; and of a subway conductor who refused to answer questions relating to subversive associations under a statute which authorized discharge when reasonable grounds existed for the belief that the employee was of doubtful trust and reliability, *Lerner v. Casey,* 357 U. S. 468; and of a teacher who refused to answer similar questions, on the ground of "incompetency", *Beilan v. Board of Education,* 357 U. S. 399; and of a social worker for his refusal to answer such questions, under a statute which made refusal "insubordination", *Nelson v. Los Angeles,* 362 U. S. 1. These and other cases, however, indicate that there are constitutional limitations on the state's exercise of these powers. For example, a broad inquiry into other kinds of associations of a non-subversive character may not be made. *Sheldon v. Tucker,* 364 U. S. 479. With respect to disclaimer oaths, the state may not indiscriminately require a disclaimer of innocent as well as knowing association, even with subversive organizations as a condition of

employment. *Weiman v. Updegraff*, 344 U. S. 183. Nor may the disclaimer form be so vague that it is impossible to determine its meaning, so that it acts as an inhibition to free association of an innocent kind. *Cramp v. Florida*, 368 U. S. 278. Also the Court has indicated that in discharging an employee whether because he is found to be a subversive or because he refuses to sign a disclaimer or answer questions, the state must accord the employee procedural due process, *i.e.*, specification of charges and an opportunity to be heard. *Nostrand v. Little*, 362 U. S. 474. It follows, therefore, that while certain inquiries under specified conditions can be made, it does not follow that academic freedom can be destroyed or inhibited on the pretense of protecting the state from disloyalty.

With respect to appellant Starbuck, it is submitted that the inquiry made of him raises serious constitutional questions. While it is clear that under some circumstances the state can inquire into matters which relate to the teacher's fitness and suitability for public employment, *Beilan v. Board of Education*, 357 U. S. 399, it is certain that a state, in exercising this power, cannot exclude a person from public employment by means of an unconstitutional system, *Weiman v. Updegraff*, 344 U. S. 183.

Thus, it would be manifestly improper for the State to deny unemployment under a guise of an alleged inquiry into qualifications where such inquiry itself invades constitutionally protected rights. It is clear that the State does not have an absolute right of inquiry.

In every instance of inquiry, the State must contend with restrictions placed upon it by the Fourteenth Amendment of the Constitution of the United States which applies to the people of the states those freedoms of speech and association embodied in the First Amendment. Thus,

in *Shelton v. Tucker*, 364 U. S. 479, an Arkanas statute was held invalid which required every teacher, as a condition of employment in a state supported school or college, to file annually an affidavit listing, without limitation, every organization to which he had belonged regularly or contributed within the preceding five years. The Court held that the statutes went far beyond what might be justified in the exercise of a state's legitimate inquiry into the fitness and competency of its teachers. It is submitted that the word "ever" and the completely retrospective query made of appellant Starbuck goes beyond the right of legitimate inquiry.

The question as to whether such remote associations as are encompassed by the word "ever" can be inquired of teachers, has not been foreclosed by *Garner v. Los Angeles Board*, 341 U. S. 716. In that case, the disclaimer affidavit containing the word "ever" regarding membership in the Communist Party was upheld. The *Garner* case involved municipal employees and the disclaimer affidavit was not so sweeping as is the one here before the Court. The affidavit there dealt only with membership. Furthermore, the oath requirement which was also upheld in that case was retrospective at most only five years.

In *Beilan v. Board of Education*, 357 U. S. 399, the Court upheld the dismissal of a teacher by a Pennsylvania School Board. The teacher had refused to confirm or refute information as to his activities eight years prior in certain allegedly subversive organizations. However, the Court pointed out at page 405:

> "Petitioner's refusal to answer was not based on the remoteness of his 1944 activities."

It is clear that the Court felt that the substantial issue would have been raised if remoteness had been the basis of the teacher's refusal to answer.

An aspect of the *Garner* case which bears on the constitutional question before us is one that is often overlooked. The State will say that the inquiry here is merely into qualifications and that no determination of eligibility can be made prior to the answering of the question involved. The implication is that appellant, Starbuck, would not necessarily be discharged if he had answered the question in the affirmative. In *Garner*, the Court stated at page 720:

> "Not before us is a question whether the city may determine an employee's disclosure of such political affiliation justifies his discharge."

In the present case, this Court is not confronted with the lack of information noted by the Supreme Court in *Garner*. It is plain what the results of an affirmative answer to the disclaimer question herein would be. In New York, affirmative disclosure of the information being elicited would result in "*prima facie*" evidence of disqualification for appointment to or retention in any office or position in the service to the state or any city or civil division thereof". New York Civil Service Law, Section 105, New York Education Law, Section 3022(2).

The reason for this is that past membership in a subversive organization is "presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Rules of the Board of Regents, Article XVIII, Section 244(2).

It is therefore clear that one who answers the question affirmatively would have the heavy burden of bringing in substantial evidence in the very first instance. And it would not matter at what age or under what circumstances the improper activity had taken place. These are circumstances not contemplated in the *Garner* case. Every inquiry into past associations is an encroachment upon

rights granted by the First Amendment. Such admitted encroachments have been allowed by the Supreme Court on the theory that the interests of the State must be balanced by those of the individual. The rationale of the cases which have allowed inquiry into past association of a public employee has been that such information was reasonably necessary to determine an appellant's fitness. Can it be said that an inquiry right to a teacher's birth is necessary in order to determine his fitness? This is the latitude which the word "ever" allows. Furthermore, a heavy burden is placed on a teacher as previously mentioned, if at some time in the distant past he became a member of a group whose present day activities are proscribed. To place such a burden on a person while admittedly infringing on his constitutionally rights of association and speech, cannot be accepted on the basis of an allegedly honest search into qualifications. The more remote the associations and speech looked, the less persuasive the qualifications argument becomes. Therefore, the use of the word "ever" raises the substantial constitutional question as to the point at which the First Amendment operates as a limitation upon state authority to inquire of state employees, particularly faculty members, and to condition employment as a lever to compel an answer.

However, there is more at stake in this case merely than questions of inquiry and the scope of inquiry which can be carried out by a public authority. The statutes and regulations involved in this case are made conditions for employment. An examination of these statutes show that they are not primarily designed to elicit information. They are exclusionary. They are designed to exclude from the public service certain individuals who fall within their

proscriptions. It is with statutory employment conditions that we deal here.

The statutory provisions and their inhibitory effect on academic freedom raise serious questions which should be decided by this Court. At the outset, however, we should direct our attention to the case of *Adler v. Board of Education*, 342 U. S. 485, for the reason that the Court below relied heavily upon it. *Adler* does not dispose of the issues in this case. The complaint in *Adler* was directed only at Section 3022 of the Education Law and Section 12-a of the Civil Service Law. Although the appellants in *Adler* argued before the Supreme Court that Section 3021 was unconstitutionally vague, the Court abstained from ruling upon the question since the issue had not been raised below. See *Adler, supra*, at page 496. In fact, the attack upon the statute in *Adler* upon the grounds of vaguenes was limited to the single word "subversive" as it appears in Section 3022 of the Education Law (see *Adler, supra*, at page 496). The present complaint is more broadly framed; appellants challenge the statutory scheme as a whole, charging that its complexities are so profound and pervasive as to render the entire network unconstitutionally vague. It should be further observed that the present complaint attacks the vagueness of the proscription set out in Section 105 (1) and (2) as well as the remainder of Section 105 of the Civil Service Law. Emphasis is placed upon this fact for the reason that although the Supreme Court in *Adler* stated that they found no constitutional deficiency in Section 12-a of the Civil Service Law, an examination of the briefs in the Supreme Court in that case discloses that the unconstitutionality of that section was not pressed; indeed, it was not even argued as both sides conceded the constitutionality of Section 12-a (appellants' brief, pp. 5-6, 9; appellees' brief,

p. 16). It is not surprising, therefore, that 12-a was so casually passed over by the Supreme Court without analysis or discussion. *Adler* is further not dispositive of the issues in this case for the reason that subdivision (3) of Section 105 of the Civil Service Law was added by the New York Legislature in 1958 (N. Y. Laws, 1958, Ch. 790). This provision, not having existed at the time *Adler* was decided, of course, has not been foreclosed from consideration by that decision. Moreover, this subdivision with its references to the Penal Law raises the questions of the effect of Sections 160 and 161 of the New York Penal Law upon the provisions here involved. Additionally, in 1958, a new paragraph was added to Section 12-a(c) (N. Y. Laws, 1958, Ch. 503). This paragraph, naming the Communist Party of the United States and the Communist Party of New York as proscribed organizations, was added long after the *Adler* decision.

The Trustees Certificate, having been established in 1956, also was not in existence at the time *Adler* was decided and thus the very important constitutional questions which it raises are not foreclosed by that decision, also the issue of the constitutionality of the Regents Rules are not foreclosed by *Adler*, since *Adler* did not consider the validity or constitutionality of the Regents Rules.

By a 1953 amendment to Section 3022 of the Education Law (N. Y. Laws, 1953, Ch. 681), the applicability of the section (and consequently of 105 of the Civil Service Law which is incorporated by reference therein) was extended to include, not only public schools, but institutions of higher learning as well. This provision was not before the Court in *Adler*. Considering that the statutes which this amendment modifies impose serious restrictions upon free inquiry, the impact of this amendment cannot be

lightly brushed aside. Our society relies heavily upon its institutions of higher learning as a source of new ideas. The challenge to orthodox political notions, however disconcerting it may be, or however repugnant it may be to the statutes presently in force in New York, is nevertheless valuable to our political self-awareness. By so depriving our professors and their students of free-inqury, we stimulate the kind of smugness presently seen to impose perhaps a greater threat to our institutions than any which has preceded it. See generally, *Morris, Baggett v. Bullitt;* Scienter and "Guiltless Knowing Behavior", 1 Law in Trans. Q. 185, 189 (1964). The public school and the institution of higher learning are designed to function at different levels and to reduce the latter to the level of the former is to destroy entirely its *raison d'etre.*

Another new and pervasive influence upon the statutes complained of arises from the reference in Section 105(3) of the Civil Service Law to the New York Criminal Anarchy Statute (N. Y. Penal Law, §§ 160, 161). It will be seen that in attempting to assign some meaning to the words "seditious utterance or act", the New York Legislature has further circumscribed the permissible conduct of those affected by the statutes and rules complained of. This amendment was added in 1958, long after *Adler* was handed down (N. Y. Laws, 1958, Ch. 790), and since it affects not only the section in which it appears, but Section 3022 of the Education Law and the Regents Rules as well, these provisions must now be carefully analyzed as to their bearing in the present suit.

With respect to the penal provisions involved in this case, it is respectfully submitted that the Court below erred in its determination that the "looser language" of Section 161 of the Penal Law was not before it.

Subdivision (3) of 105 of the New York Civil Service Law is captioned "Removal for Treasonable and Seditious Acts or Utterances" and provides:

> "A person in the civil service of the state or of any civil division thereof shall be removed therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason' as defined in the Penal Law, a seditious word or act shall mean 'criminal anarchy' as defined in the Penal Law."

Section 160 of the New York Penal Law provides:

> "Section 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. *The advocacy of such doctrine either by word or mouth or writing is a felony.*" (Emphasis supplied.)

Section 161 of the New York Penal Law is entitled "Advocacy of Criminal Anarchy". The section then relates what acts, associations and beliefs, constitute the advocacy of criminal anarchy. It is perfectly clear that both sections are intimately bound together. "The advocacy of such doctrine" (N. Y. Penal Law, § 160) is obviously defined in Section 161, and as such, constitutes a part of the complex involved here and is incorporated into Civil Service Law Section 105 (3). There is no need for this Court to go to a dictionary for the definition of "advocacy". The State Legislature of New York has set out the definitions in § 161. The serious constitutional questions raised by these definitions cannot be avoided merely by leaving out the operative sentence of Section 160 (see opinion of the three judge district court, Appendix, *infra*, page 48).

Furthermore, and most importantly, at no stage of the proceedings involved in this case from its inception through

all of the oral arguments and briefs had herein, has the Attorney General of the State of New York or the counsel for the State University of New York denied that Section 161 is included in the complex before this Court. Neither have they denied that a violation of that provision would result in dismissal proceedings under the complex as indeed they could not since the New York Court of Appeals has indicated that two sections are to be construed together.

> "James Larkin, Benjamin Gitlow, C. E. Ruttenberg, and Isaac E. Ferguson, were indicted, tried and convicted for the crime of criminal anarchy *as defined by Sections 160 and 161* of the Penal Law * * *" *People v. Gitlow,* 234 N. Y. 132, at 135. (Emphasis supplied.)

Therefore, the appellants maintain that Section 161 of the Penal Law is before this Court.

Thus, in essence, it is a vastly different statutory scheme which is here attacked than that which was before the Court in *Adler*. Furthermore, the parties attacking these statutes have interests which differ considerably from those parties in the original *Adler* proceeding. As to *Adler's* substance, it can be observed that the Court adhered to the concept of public employment, academic or otherwise, as a privilege. See *e.g., Bailey v. Richardson,* 182 F. 2d 46 [D. C. Cir. 1950], aff'd 341 U. S. 918. It was said in *Adler* that teachers had "* * * no right to work for the state in the school system on their own terms. If they [did] not choose to work on such terms, they [were] at liberty to retain their beliefs and go elsewhere", *Adler, supra,* at p. 492. The Supreme Court, subsequent to *Adler,* has clearly indicated that state employment does not fall into the "privileged classification". *Weiman v. Updegraff,* 344 U. S. 183 at 191-192. See also *Slochower v. Board of Education,* 350 U. S. 551 at p. 555; *Cramp v. Florida,* 368 U. S. 278 at p. 288. Further, *Adler*

was decided before this Court fully recognized the constitutional protection of the right of private association. *NAACP v. Alabama*, 357 U. S. 449. The *Adler* decision also failed to take account of the more lately recognized importance of academic freedom, *Sweezy, supra.* Furthermore, *Adler* relied in part on *Garner v. Los Angeles Board*, 341 U. S. 716 for a point which was expressly not considered in *Garner* and about which the Court stated at page 720 "not before us is the question whether the city may determine that an employee's disclosure of such political affiliation (in the Communist Party U. S. A.) justifies his discharge." In New York, affirmative disclosure of the information being elicited would result in "prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the State or any city or civil division thereof." Also, the Court's reliance on *Garner* was misplaced for the reason that *Garner* did not consider the interests of a state nor those of a professor nor those of society in academic freedom on a university campus. *Garner* does not speak of this set of relationships. That the interests of both the state and an employee in the municipal civil service differ materially and fundamentally from a state's interests in its professorial faculty and a professor's interest in academic employment cannot be denied. Whatever interest the state may have in minimally restricting the speech and association of a municipal civil servant as a condition of his employment, that interest is obviously not of the same order as is its interest with respect to the speech and association of university faculty members. The Court's opinion below indicated that this Court's disposition in *Gerende v. Board of Supervisors*, 341 U. S. 56 has a strong bearing on the issues involved in this case (Appendix, *infra*, page 67). The *Gerende* case does not dispose of any issues in this case. In *Gerende* this

Court affirmed the judgment of the Maryland Court of Appeals on the grounds that "a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by force or violence' * * *". *Gerende, supra,* at page 67. This Court did not have before it Section 15 of Maryland's Ober Act, which broadly defines a "subversive person", as the Maryland Court had held that the section did not apply to *Gerende, Shub v. Simpson,* 76 A. 2d 332 at 341.

Neither is this case controlled by *Konigsberg v. State Bar,* 353 U. S. 252 and *In re Anastoplo,* 366 U. S. 82, for the reason that has been stated above that there is a difference between a state offering a "privilege" and the state legislating conditions of state employment. Neither is this case controlled by *Beilan v. Board of Education,* 357 U. S. 299, for the reason that in the *Beilan* case the individual involved there could have given the required information and still retained his employment. It will be noted that in the State of New York that result is not the case. The system is exclusionary and not designed to secure information only. For similar reasons, *Lerner v. Casey,* 357 U. S. 468 and *Nelson v. Los Angeles,* 362 U. S. 1, do not control. For the reasons set forth above, a mere recitation of citations involving the employee dismissal cases will not answer the issues raised by the case at bar.

To attempt to foreclose the issues in this case by referring to *Gitlow v. New York,* 268 U. S. 652 is to overlook the present status of *Gitlow.* Justice Frankfurter, while acknowledging that *Gitlow* had never been explicitly overruled, stated, nevertheless, that "* * * it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision." *Dennis v. United States,* 341 U. S. 494, 541. Since *Gitlow,* this Court

has decided such cases as *Winters v. New York*, 333 U. S. 507, *Lanzetta v. New Jersey*, 306 U. S. 451, *Cramp v. Florida*, 368 U. S. 278 and *Baggett v. Bullitt*, 377 U. S. 360, which cast further doubt upon *Gitlow's* validity.

Thus the many issues raised by the case are issues not presented in the original *Adler* proceeding. This Court now has the opportunity to critically analyze the statutory provisions involved here and which have been made the contract terms of the appellants, from the point of view of their reasonableness, especially when viewed with regard to First Amendment freedoms and the interests of those whom society should guard most strongly—its academic personnel.

An examination of the provisions involved in this case will show that within the literally hundreds of proscriptions contained therein is conduct and language which the Supreme Court has often recognized in the past as constitutionally protected. Where one is prohibited from the utterance of any word of "criminal anarchy", he is prohibited from discussing in the most abstract manner, those political doctrines which are today opposed to ours; indeed, the Appellate Division of the New York Supreme Court has been of the opinion that the writings of Karl Marx fall within the condemnation of the Penal Law sections. See *In re Lithuanian Workers Literature Soc.*, 196 App. Div. 262, 187 N. Y. 612 (2d Dept., 1921). The sections would also prohibit the carrying on a public street by a university professor of a copy of the Communist Manifesto: "* * * publicly any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *", Penal Law, Section 161(2).

Also included within the prohibitions of the above sections is a college faculty member who "* * * edits * * * any book * * * containing * * * the doctrine that the government

of the United States * * * should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * *" (Civil Service Law, 105 (1)(b)).

Thus, New York bars from public employment, not only those who do certain innocent acts, but those who believe in forbidden ideas and concepts as well. It is an extremely serious matter when the state attempts to legislate in the areas of beliefs and this Court has been most careful when dealing in areas involving state compulsion in such matters. See *Torasco v. Watkins*, 367 U. S. 448.

In addition to forbidding innocent activity and belief, the statutes here under consideration prohibit public employment to one who "* * * voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine", Penal Law, Section 161(4). Thus phrased, the proviso is clearly repugnant to the United States Constitution, *DeJonge v. Oregon*, 299 U. S. 353.

It will be observed from a close analysis of the statutes in question that aside from issues involving innocent conduct and speech which are clearly protected by the United State Constitution, that the State of New York has forbidden other conduct and speech upon a lesser standard than do the Smith Act cases. Thus, for example, N. Y. Penal Law, Section 161(1) makes one guilty of a crime who "by word of mouth or writing, advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence * * *". This must be compared with the admonition of the Supreme Court that "We held in *Yates*, and we reiterate now, that the * * * teaching of the moral propriety or even moral necessity for resort to force or violence, is not the same as preparing a group for violent action and sealing

it to such action." *Noto v. United States*, 367 U. S. 291 at 297, 298.

Most importantly, counsel submit that the complex is fatally defective in material parts because its commands are stated in vague and uncertain language which makes it difficult or impossible for those subject to its terms to ascertain its meaning and which permits it to be applied in situations not properly within the scope of state power. For example, Section 3021 of the New York Education Law requires the removal of academic personnel "* * * for the utterance of any treasonable or seditious word * * *". Phrased thus broadly and loosely, it is on its face repugnant to the Federal Constitution. We should ask ourselves is "down" a seditious word? Is "down with the United States Government" a seditious phrase? Justice Frankfurter, by way of *dicta*, has indicated clearly the problem which Section 3021 poses. *Adler v. Board of Education, supra*, at 506 (dissenting opinion). Subdivision (3) of Section 105 of the New York Civil Service Law contains language similar to Section 3021 and, therefore, is similarly questionable. Unlike Section 3021, this subdivision states that "seditious" shall mean "criminal anarchy", as defined in the Penal Law. These definitions, however, do not ameliorate the vagueness of the words purportedly defined. On the contrary, Section 105(3), by equating "sedition" with "criminal anarchy" only further aggravates the language already unconstitutionally vague.

The Court should also note that a college professor has uttered a seditious word and is thus to be barred from public employment where he "* * * justifies by word of mouth * * * the * * * unlawful * * * assaulting of any executive * * * of * * * any civilized nation having an organized government * * * or any other crime * * * with

intent to * * * spread the propriety of the doctrine of criminal anarchy * * *", N. Y. Penal Law, Section 161(3). We are not told what is meant by a "civilized nation" or at what stage in its development a government becomes "organized". Furthermore, "justifies" embraces a multitude of acts so broad as to be limited only by the hearer's prejudices. The range of behavior proscribed by "* * *justifies * * * any crime * * *" is so broad as to define comprehension.

Still another impermissible feature of the complex is the use of the phrase "helps to organize", Civil Service Law, Section 105(1)(c); N. Y. Penal Law, Section 161(4). To be required to ascertain whether one "helps to organize" is to surrender completely to hopeless confusion. It catches the assistant to the assistant.

The questions which Justice White found to be left open by the Washington statute in *Baggett v. Bullitt*, 377 U. S. 360, at 368-73, are similarly left open by the statutes presently complained of. In *Cramp v. Florida*, 368 U. S. 278, the Supreme Court found unconstitutionally vague the requirement that a teacher not lend "* * * aid, support, advice, counsel or influence to the Communist Party". Far more vague is the requirement presently complained of that no academic personnel engage in "treasonable or seditious acts". Both requirements would proscribe constitutionally protected conduct, yet the latter leaves far more room for argument as to the quantum and quality of the conduct which it proscribes.

In a series of cases, the Supreme Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common in-

telligence to guess at their meaning and to differ at their application. *Winters v. New York*, 333 U. S. 507, *Lanzetta v. New Jersey*, 306 U. S. 451, and the cases cited therein.

The resulting effect of the broad and vague language contained in the complex under consideration, is that a person engaging in teaching activities in the State of New York will find it impossible to know when some action of his, knowingly or wilfully undertaken, will be construed to be an act falling within the prohibition of the complex. Similarly, he would not know whether a speech or pamphlet of his might also be held to fall within the prohibitions involved in this case. Such uncertainties plainly fail to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know where the standards imposed will draw the line between the allowable and the forbidden. The Supreme Court, in *Smith v. California*, 361 U. S. 147, at page 151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may be less required to act at his peril here, because the free dissemination of ideas may be the loser." See also *NAACP v. Button*, 371 U. S. 415 at p. 432-433.

No one can deny that the sweeping breadth and scope of the prohibited conduct with its threats of possible imprisonment as well as loss of employment constitute the type of statutory scheme which will inhibit and deter the First Amendment freedoms of those to whom our society has need to give the freest rein of intellectual inquiry—university professors and scholars.

A striking feature of this complex is the fact that membership in groups which do not advocate forceful over-

throw of the government is presumptive evidence of disqualification for appointment to or retention in the public service of the State of New York. This is the case because the Rules of the Board of Regents provide that:

> "The Board of Regents will issue a list * * * of organizations which the Board finds to be subversive in that they * * * embrace the doctrine that the government of the United States * * * shall be overthrown or overturned by force * * * or that they * * * embrace the * * * propriety of adopting any such doctrine * * *". Article XVIII, Section 244(2).

This must be compared to Civil Service Law, Section 105(c) which proscribes membership in a group "* * * which * * * advocates that the government of the United States * * * shall be overthrown by force or violence * * *".

It is apparent that the State is empowered by virtue of the Rules of the Board of Regents to proscribe membership in groups which merely believe in the proposition that the government of the United States shall be overturned by force. The indefiniteness of such a proscription is readily apparent.

In view of what has been said with respect to the statutory complex here involved as well as its possible inhibitory effects upon academic personnel situated throughout the State of New York, the appellants submit that the issues raised are substantial and merit full plenary review and argument before this Court.

In considering the foregoing arguments, we ask this Court to consider that the threat of criminal prosecution permeates and pervades the statutory scheme. Many of the same acts which will result in a loss of public employment are defined as criminal. While it might be argued that the danger of prosecution is limited, the Supreme Court has stated that First Amendment freedoms

are delicate and vulnerable as well as supremely precious in our society and that the threat of sanctions may deter their exercise almost as potently as the actual application of them. *C. F. Smith v. California,* 361 U. S. 147, at 151-154; *Speiser v. Randall,* 357 U. S. 513, 526. Furthermore, "it would be blinking reality not to acknowledge that there are some among us always ready to fix a Communist label upon those whose ideas they violently oppose. Experience teaches that prosecutors too are human". *Cramp v. Florida,* 368 U. S. 278 at 286-287. In times such as these, with the rapid growth of extreme right wing organizations, it is not unrealistic to consider the threat of prosecution a serious one. In addition, university professors and scholars are extremely vulnerable when operating under such broad and indefinite prohibitions. Their function is to examine, to question, to dispute, to explore unorthodox and unpopular notions. Thus, they are most apt to cause the passions of the community to become aroused. In circumstances such as those, they can, under the penal provisions of this complex, be placed at the mercy of unsympathetic judges and juries. There may not be much hesitancy in reaching a verdict that someone who is unpopular is also a subversive and, therefore, a criminal. Past history shows that it is not only the ignorant who would drag those who pursue social reform into the Communist camp, but also judges, prosecutors, legislators, and candidates for all those offices. By abridging freedom of thought, speech, association and academic freedom through the imposition of this umbrella of prior restraints upon appellants imposed by language which is vague, indefinite and ambiguous, university scholars must, at their peril, guess as to the meanings of the standard imposed and are forced to speculate as to the nature of the penal and other laws which might be applied to them. They are thereby denied reasonable advance

notice of the circumscribed areas involved and thus are inhibited and restricted in the area of constitutionally protected freedoms. This issue, touching as it does, upon hundreds of university educators and scholars, is thus one of extreme significance and importance and merits the full attention of this Court.

B. The question whether the complex involved here unconstitutionally deprives appellants of due process of law.

1. *The lack of a hearing.*

In addition to the serious constitutional problems raised by the State requirement that all teachers sign the Feinberg Certificate and the questions raised by the completely retrospective questions asked of appellant Starbuck, coupled with the dismissal for public employment provisions, see *Speiser v. Randall,* 357 U. S. 513, the complex does not afford academic personnel serving on contract and without tenure a formal hearing in respect to non-renewal of their terms.

In Article XVIII, Section 244, of the Rules of the Board of Regents, subdivision (2)(e), the Board of Regents has declared that:

> "In proceedings against persons serving under contract and not under the provisions of the tenure law, the school authority shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal."

Thus, the appellants presently still employed at the State University will have no right to a hearing in the event they are dismissed. This is so despite the fact of Civil Service Law, Section 105(2), since under the new procedures, "refusal of a candidate to answer any question relevant to such inquiry * * * shall be sufficient ground to refuse to make or recommend appointment" (Resolu-

tions, Section 3, Appendix, *infra*, page 90). Under this procedure, the appointment would be refused on grounds that the candidate had blocked an inquiry into his qualifications rather than as disqualification under the complex. Thus, no hearing is afforded.

Appellant Starbuck was appointed pursuant to the New York Civil Service Law in a temporary capacity on September 1, 1963 as a specialist in acquisitions but was dismissed without a hearing on June 18, 1964 for failing to answer a question relative to past political beliefs and actions previously set forth (*supra*, this Statement, page 9). With respect to appellant Starbuck, the State has definitely taken the position that temporary state employees who are discharged for failure to answer the question involved are not entitled to a hearing. Thus, the right of all appellants here to a hearing is clearly an issue.

If there were no possible explanation or defense for failure to give the information requested, then it might be said that a hearing would be unnecessary because such refusal to give the requested information would inevitably result in a conclusion of unfitness. However, there are many reasons why a professor or state employee might not want to answer which in no way would reflect on his loyalty or unfitness for the job. Thus, an opportunity to explain could lift the cloud of suspicion which a refusal to answer would generate. The Supreme Court has recognized the vital importance of a hearing in situations of this type.

In *Slochower v. Board of Education*, 350 U. S. 551, the issue revolved around the New York City Charter which provided for the dismissal from employment of any employee who utilized his privilege against self-incrimination to avoid answering a question relating to his official conduct. The Charter provided in effect, that the dismissal

was to be automatic without right to notice charges or hearing. Slochower, an assistant professor at Brooklyn College, a public institution, exercised his right against self-incrimination with respect to former membership in the Communist Party before a committee of the United States Senate. He was summarily discharged. The United States Supreme Court held that the discharge violated both substantive and procedural due process. In speaking of the procedural aspect, the Court stated, at p. 559:

> "We hold that summary dismissal of appellant violates due process of law."

The Supreme Court has consistently shown its concern with lack of procedural safeguards subsequent to *Slochower*. This can be seen in the instances where the Court has felt obligated to comment upon the question even where the issue had not been raised by the parties.

In *Nelson v. Los Angles County*, 362 U. S. 1, Globe, a municipal employee, was discharged from public employment for refusing to answer certain questions concerning subversion before a sub-committee of the House Un-American Activities Committee. A statute of the State of California made it the duty of any public employee to give such testimony. Since he was a temporary employee, Globe was denied a hearing on his discharge on the ground that he was not entitled to a hearing under the civil service rules of the county. Commenting upon the procedural aspects of the case, the Court stated at page 8:

> "But petitioner here raises no such point, and clearly asserts that "whether or not petitioner Globe was accorded a hearing is not the issue here'."

In Footnote 5, the Court states:

> "Nor does petitioner make any attack on the failure of California's statute to afford temporary employees such as he an opportunity to explain his failure to

answer questions. It will be noted that permanent employees are granted such a privilege."

In *Nostrand v. Little*, 362 U. S. 474, two professors at the University of Washington brought an action challenging the validity of the state's statute which required all public employees to subscribe to an oath that they were not subversive persons or members of the Communist Party or any subversive organization within the meaning of the statute. Refusal to take the oath was made grounds for immediate termination of employment. The Supreme Court of the State of Washington upheld the constitutionality of the statute. However, the United States Supreme Court remanded the case to the Washington Court for a determination as to whether state employees who refused to sign the oath would be entitled to a hearing. The Court used the following language at page 475:

> "One of the claims is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. The Supreme Court of Washington did not pass on this point. The Attorney General suggests in his brief that prior to any decision thereon here, 'the Supreme Court of Washington should be first given the opportunity to consider and pass upon' it."

On remand, it was stated in the Washington Supreme Court:

> "Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the Act, it is violative of due process." *Nostrand v. Little*, 361 P. 2d 551, 567.

The Court found a hearing would be required.

An appeal was again taken to the United States Supreme Court which, in a *per curiam* decision, dismissing the case for want of a substantial federal question. *Nostrand v. Little*, 368 U. S. 436.

Justice Douglas, dissenting, stated at page 436:

> "The disposition that the Court makes of the case resolves one of the questions presented by the appeal, *viz.*, that appellants are entitled to a hearing before they can be discharged for refusing to take the oath."

Justice Douglas would have considered the substantive aspects of the case as well.

It is clear from the cases that a teacher has the right to a hearing before discharge from employment where his discharge has been predicated upon his refusal to answer questions concerning alleged subversive activities. The rationale of such a right is no doubt based upon the fact of a recognition by the Supreme Court of the public reaction to a dismissal from employment were questions of subversion are raised.

As was stated in *Baggett v. Bullitt*, 219 F. Supp. 439, at 452:

> "Although discharge of a state employee for failing to fulfill a condition of employment by signing the loyalty oath carries no necessary inference of disloyalty to the employee, it would be ostrich-like to ignore the practical realities of a public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status. The severe impact of such a discharge upon an employee whose refusal may be motivated by considerations unrelated to disloyalty, invokes the protection of due process with compelling force."

With such a rationale, it is unlikely that the Supreme Court would distinguish between tenured and non-tenured teachers. *Baggett v. Bullitt*, 377 U. S. 360, involved non-teachers among others who were summarily discharged for failing to subscribe answers to a loyalty oath and an oath of allegiance.

The oaths were declared unconstitutional on vagueness grounds, however, it is interesting that Justices Clark and Harland, in dissenting, stated at page 384:

> "Likewise, in view of the decision of Washington's highest court that tenured employees would be entitled to a hearing * * * the due process claim is without foundation. This conclusion would also apply to those employees without tenure, since they would be entitled to a hearing under Washington's Civil Service Act * * *"

The State of New York has taken the position that Starbuck, as a temporary state employee, is not entitled to a hearing. Under the procedures involved, the other appellants are not entitled to a hearing also.

Thus the questions presented by this aspect of the case are substantial in that they directly raise fundamental constitutional issues with respect to the power of a state to discharge non-tenured and temporary state employees without a hearing where questions relating to subversion are involved.

It is submitted that the Court below fails to meet this issue squarely. The Court evidently upheld the discharges without a hearing on the grounds that a hearing is provided where an affirmative answer to the question is given. That, of course, was not the issue. The Supreme Court has been concerned with the issue of a hearing where there has been a refusal to answer.

From the above analysis, it can be seen that termination of public employment is automatic, "it matters not whether the * * * [failure or refusal] resulted from mistake, inadvertence, or legal advice conscientiously given, whether wisely or unwisely", *Slochower v. Board of Education*, *supra*, 350 U. S. at 558, or happens to rest upon honest belief that the United States Constitution prohibits such

inquiry as is made into a person's thoughts and speech. *C. F. Konigsberg v. State Bar, supra*, 353 U. S. 252. There is here no concern for the employee's reasons, whether they are with or without justification. Even if a public employee holds the steadfast conviction that the federal constitution shields him from being compelled to make the disclosures required, the procedures here provided only two alternatives: either to answer or to suffer summary discharge from state employment.

With respect to the employee dismissal cases cited by the Court below, it should be pointed out that this case is distinguishable from those cases wherein discharge (or denial of application) has been predicated upon refusal of the individual to respond to proper questions. In each of the cases cited by the Court below, the individual involved was accorded an opportunity to delineate formally, for the record, the reasons for his non-response. See, *Nelson v. County of Los Angeles*, 362 U. S. 1, *Konigsberg v. State Bar*, 366 U. S. 36, *In re Anastaplo*, 366 U. S. 82. See also *Beilan v. Board of Education*, 357 U. S. 399 (a teacher's dismissal followed a formal hearing), *Lerner v. Casey*, 357 U. S. 468 (the statute required dismissal to be "after investigation" and "based upon all the evidence". Furthermore, in that case, Lerner appeared before the Department of Investigation three times, twice with counsel.). Thus the crucial constitutional distinction involved in the employee dismissal cases and the case at bar is evident.

This case presents this Court with a clean issue as to the right of a hearing to the appellants involved. It seems that in no case before this Court has a definitive determination of the issue been had. The issue has, of course, arisen collaterally in cases previously mentioned. This Court should finally resolve the matter as it is serious and im-

portant, as it concerns the lives of hundreds of people throughout the State University system. And see generally Murphy, "Academic Freedom—An Emerging Constitutional Right", 28 Law and Contemporary Problems, 447, 481-483.

2. *The burden of proof is shifted.*

The membership portion of the statutory scheme involved provides that no one shall obtain or retain public employment in the State of New York who "* * *become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means", Civil Service Law, Section 105(1)(c). See also Penal Law, Section 161(4).

Civil Service Law, Section 105(2), Education Law, Section 3022(2) and the Rules of the Board of Regents, Article XVIII, Section 244(2) provide in essence that the Board of Regents shall after inquiry and notice, make a listing of organizations which it finds to be subversive, in that they violate the provisions of former 12-a of the Civil Service Law (now Section 105). It is further provided that evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such listings shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Additionally, evidence of membership in such an organization prior to the said date shall be presumptive evidence that membership has continued in the absence of a showing that such membership has been terminated in good faith. Furthermore, once a determination of ineligibility has

been made, the party declared ineligible may have a hearing in the Courts at which time the person declared ineligible shall have an opportunity for cross examination. Once the party involved has presented substantial evidence contrary to the presumptions mandated by the statute, the burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the evidence shall be upon the person making such order.

The obvious purpose and effect of the *prima facie* characteristic of the statute, together with the listing authority, is to relieve the State from the burden of having to prove in any disciplinary hearing the major elements of its case. At any hearing, only one fact need be established: membership. Having done so, the State can rest. This is so, since under the Regents' listing of the Communist Party of the United States and of New York, the State would be able to avoid independent proof as to the nature of the organization listed. Thus, the individual involved would be faced with the onerous burden of rebutting the presumptions created. All membership is deemed guilty membership by reason of the fact that at any hearing the only issue involved with respect to organizations listed the employee's knowledge of its ends and goals. Without benefit of trial, members of the proscribed organization are branded and stigmatized with the illegal aims of the group. Nothing further need be shown except that the individual is a knowing member of the organization. And for such membership, the scholar or teacher involved, or indeed, any member of the Civil Service of the State of New York is forever barred from employment in the service of the State. This is guilt by association with a vengeance. Appellants maintain that if one ignores semantics for substance, there has been an unconstitutional shifting of the burden of proof within the hold-

ing of *Speiser v. Randall*, 357 U. S. 513. The basic holding of *Speiser* is that when First Amendment freedoms are at stake, the burden of proof cannot be shifted to the individual. The State here will maintain that the burden of persuasion in the whole case is always on the one bringing the charges. But the statutory language cannot alter fact. The fact is that the major elements of the State's case are initially presumed. Appellants maintain that the rationale of *Speiser* is broad enough to cover the case at bar and that thus a serious and important constitutional question is raised. *Speiser* turned on the vital importance of First Amendment freedoms and it would be remarkable if the Supreme Court were to allow that decision to become a shell by upholding systems which presume all major elements of a state case except one.

Additionally, with respect to appellant Starbuck, the State has demanded of him, as was demanded of the individuals in *Speiser v. Randall, supra*, that he take the first step, execution of an answer to the question. Clearly requiring the execution of an answer to the question places the burden of persuasion and proof upon appellant Starbuck, and necessarily results in the deterrents of speech which the Constitution makes free. It presumes guilt and non-employability of all state employees, presuming either that they advocate the prohibited doctrines, or that they are members of the prohibited organizations. If and only if Starbuck comes forward and executes the proper answer will he become a member of the favored group, the group eligible for State employment. The question is asked of all alike—the loyal and the disloyal. In other words, the question presumes non-employability and then shifts onto Starbuck on pain of prosecution for perjury, the task of determining his own eligibility. Such a procedure is prohibited to the State, *Speiser v. Randall, supra*. The ques-

tions raised by this type of procedure are substantial and merit a full hearing by the Court.

C. The question whether the complex is a bill of attainder.

There is raised by this lawsuit the question of whether the statutory scheme here under attack is a bill of attainder. Appellants maintain that the complex inflicts punishment without a judicial trial. While this Court has not yet decided that loss of public employment constitutes punishment, see *Garner v. Los Angeles Board*, 241 U. S. 716 at 721, it seems clear that

> "Disqualification from the pursuits of a lawful avocation * * * may also and often has been imposed as punishment." *Cummings v. Missouri*, 4 Wall 277 at p. 320.

New York Civil Service Law 105(1)(c) provides that no one shall obtain or be retained in public employment who

> "* * * become a member of any * * * group of persons which * * * advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means.
>
> For the purposes of this Section, membership in the Communist Party of the United States of America or the Communist Party of the State of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil subdivision thereof."

It is no argument to say that the State has merely created a rule of evidence with respect to membership in certain groups which the individual involved can rebut. The fact of the matter is that under the system as set up by the State, members of the Communist Party of the

United States of America and the Communist Party of the State of New York are presumed guilty and disqualified from public employment unless they can first remove the guilt. The serious constitutional questions raised by such a system have come before the Supreme Court in another context. Thus, in *Cummings v. Missouri*, 71 U. S. 277, at page 320, the Court stated:

> "The existing clauses presume the guilt of the priests and clergymen and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is affected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case opposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows."

The Court below, in holding the complex not to be a bill of attainder, placed particular reliance upon the fact that the proscription was not based on an original determination by the State Legislature of the aims of the Communist Party but rather was based upon the findings of the Board of Regents which, after extensive hearings, listed the two organizations under Section 3022 of the New York State Education Law.

This reasoning ignores the fact that the Board of Regents listed the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations *in 1953* (emphasis supplied). The crucial constitutional factor involved here is that the State Legislature took cognizance of the listing by the Board of

Regents *in 1958* (emphasis supplied), five years after the original determination.

It is clear from the preamble to the amendment incorporating the reference to the two parties that the purpose of the reference was to bring Section 105 into harmony with the determination of the Board of Regents under Section 3022. N. Y. Session Laws, c. 503, § 1 (Appendix, *infra*, page 59). An examination of that preamble indicates that the Legislature considered nothing other than the fact of listing by the Board of Regents.

It seems clear, therefore, that the Legislature of the State of New York in 1958 made an original determination that the Communist Party of the United States and the Communist Party of the State of New York were organizations which fell within the prohibitions of the complex involved here. The Legislature must have found, that is, as of 1958 at least, that the organizations listed by the Board of Regents in 1953 continued to possess the characteristics which had led to the original listing. Thus we had a "trial by Legislature", *United States v. Brown*, 381 U. S. 437 at 442.

The seriousness and substantiality of the federal questions raised by the manner in which the New York Legislature has proceeded to move forward in this case are readily apparent. The New York Legislature could not constitutionally assume that the findings which underlay the listing of the organizations involved in 1953 were sufficient to support the legislative amendment of 1958. It is submitted that after a period of five years, such findings by the Board of Regents were stale. It is further submitted that since it is First Amendment freedoms we are dealing with, the remoteness of the findings is certainly an element which the Court should consider. The com-

plex is a bill of attainder and the manner in which the State Legislature has proceeded should be carefully scrutinized by the entire Court.

D. The question whether the New York complex is an *ex post facto* enactment.

It has previously been mentioned that the statutory scheme in New York is essentially exclusive and is not designed merely to elicit information. Information as to past activity in subversive groups brings into play the exclusionary mechanism of the statute and the application of legislatively determined presumptions. It cannot be denied that presumptions once operative present a formidable barrier to continuing employment. Past membership in proscribed groups is presumed to have continued unless termination of such membership in good faith can be shown. Clearly to burden an employee with such a presumption for an act remote in the past, which act may have taken place prior to the enactment of the legislation, is to punish that individual for innocent past acts. Indeed, such membership may have been in the 1930's when the Communist Party, for example, was just another political party, see *Cramp v. Florida,* 368 U. S. 278 at 286. To allow the projecting back of present anxieties and fears to acts which in the past were innocent, presents a real danger to our liberties. The creation of the presumption here is punishment since the consequences of the presumption are substantial. Further, the impact of this *ex post facto* enactment on First Amendment freedoms is considerable. The vice in this complex is that it creates a disability for conduct which has already taken place. To sanction such a principle leaves no speech or association of the present protected.

When considering this question, we ask this Court to take note of the fact that there is a distinction between legislation where the *ex post facto* elements create a substantial disability as in our case with the creation of presumptions, and legislation where the *ex post facto* elements require compulsory revelation without specific consequences as in many employee dismissal cases. The first situation with its officially imposed disadvantages is truly *ex post facto*, while the second, equally offensive, has its greatest impact in the area of the First Amendment freedoms.

In view of the above, it is believed that the question presented by this appeal with respect to the *ex post facto* provisions of the complex are substantial and directly raise fundamental constitutional issues. See *Calder v. Bull*, 3 U. S. 386 at p. 390. See also *Cummings v. Missouri*, 71 U. S. 277 (it is now clear that legislation which is essentially punitive cannot escape censor merely because it is cast in civil form).

Conclusion

The statutory scheme involved here is highly unique and complex. The constitutional issues involved are those which are continually rising in an age when international distrust and fear have become a way of life. See *Baggett v. Bullitt*, 377 U. S. 360 at 366. The State will indicate that the government's purpose in enacting and enforcing these statutes is the elimination of those tainted with disloyalty from the school system of the State. If we assume *arguendo*, that such a legitimate State need in the present circumstances, the State, according to the decisions of this Court is still not free to subjugate liberties if its desired ends can alternatively be achieved in a manner which is less restrictive of constitutional rights.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose." *Shelton v. Tucker*, 364 U. S. 479 at 488.

Applying this concept to the case at bar, appellants believe that a substantial federal question is raised as to the unconstitutionality of this complex and that the State's purpose could obviously be accomplished in a manner which does not involve a wholesale invasion of constitutional rights. The statutes are a jumble of vague, broad, indiscriminately worded provisions which severely impair constitutional rights without any evidence that there are not less restrictive means to accomplish the basic State purpose.

It is submitted that the elimination of the statutes will in no way interfere with the State's goal of obtaining fit and competent teachers nor will it prevent the imposition of honest and legitimate qualifications for the teaching profession. Men have struggled for centuries to establish and preserve the delicate freedoms with which we are here concerned. These freedoms cannot be preserved where a public authority can demand of an individual that he make a choice between his constitutional liberties and his economic well-being. It is only too evident that confronted with such a decision, most men, reluctant though they may be, will choose to feed their families rather than make a stand. There were hundreds at the University of Buffalo who were opposed to the certificates in question. Only five had the courage to stand against economic coercion. This is not to say that the stature of those who op-

posed the certificates, but who in the end signed, should in any way be diminished. They acted from an impulse profoundly basic in any society—the impulse to preserve and maintain the economic status of their families. The very fact that men can be put to the test in such a manner is reason enough for this Court to critically analyze the complex before it.

Respectfully submitted,

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ROSARIO J. DILORENZO, with
RICHARD LIPSITZ, *on the Statement.*

APPENDIX

Opinion

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Defendants.

Civil Action File No. 10,994.

Before: MOORE, *U. S. C. J.*, BURKE, *Ch. J.* and HENDERSON, *U. S. D. J.*

Appearances:

Richard Lipsitz, of Lipsitz, Green and Fahringer, Buffalo, New York (Rosario J. DiLorenzo on the brief), for plaintiffs.

John C. Crary, Jr. (Richard A. Foster and David L. Segal on the brief), for defendants Board of Trustees—State University of New York, State University of New York at Buffalo, Clifford C. Furnas, Samuel B. Gould, and J. Lawrence Murray.

Ruth Kessler Toch (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), for defendants Board of Regents of the University of the State of New York, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk.

MOORE, *C. J.*

This suit challenges the constitutionality of Sections 3021 and 3022 of the New York Education Law, Section 105 of the New York Civil Service Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the procedures used under these various statutes and regulations. Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law, as they are now in effect, are set forth in the margin.[1]

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[1] *Civil Service Law*

§ 105. *Subversive activities: disqualification.*

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises, or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

(Footnote continued on following page)

Section 244 of Article XVIII of the Rules of the Board of Regents, promulgated after the enactment of Section 3022 of the Education Law, provides that school authorities shall put into effect certain procedures for disqualification and removal of employees who violate Section 3021 of

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(Footnote continued from preceding page)

For the purpose of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.*

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonble or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.*

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members *and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof* who violate the provisions of sections

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the Education Law or Section 105 of the Civil Service Law. Before appointment of an employee, the nominating official shall inquire of his former employers and of others whether he is known to have violated the statutory provisions, and no person found to have violated the statutes shall be eligible for employment. Each year school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership in an organization listed as subversive by the Board of Regents, indicating that the employee has violated the statutes. If there is such evidence, the reporting official is to recommend the employee's dismissal, and within 90 days after the recommendation has been submitted, the

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three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Section 12-a of the Civil Service Law, referred to in Section 3022 of the Education Law, now appears as Section 105(1) and (2) of the Civil Service Law, N. Y. Sess. Laws, ch. 790, § 105.

school authorities must either prefer formal charges or reject the recommendation. If charges are preferred against persons serving on probation or having tenure, statutory dismissal procedures shall be followed. "In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings * * * as they deem the exigencies warrant, before taking final action on dismissal. In all cases, all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed."

The State University of New York at Buffalo, attempting to comply with the Regents' rules, distributed to all members of the academic staff a booklet containing the Regents' rules and the underlying statutes, and required each faculty member to sign a certificate (the "Feinberg certificate") declaring that he had read the Regents' rules; that the rules and the statutes cited therein constituted terms of his employment; and that he was not now a member of the Communist Party and if he ever had been, he had communicated that fact to the president of the university.

Four of the five plaintiffs in the present action—Keyishian, Hochfield, Garver, and Maud, all under term appointments to the academic staff of the University—declined to sign the certificates, and were notified that if they did not sign as requested their terms would not be renewed on grounds of insubordination. Keyishian's term has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions. They have been informed that dismissal proceedings will not be started against them until the validity of the statutes, rules, and procedures is de-

termined in the present suit. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university.

The fifth plaintiff, Starbuck, was appointed on September 1, 1963, to a one-year term as a specialist in acquisitions for the library. After starting work he was required to fill out a form, one question of which asked: "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the government of the United States or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means?" He refused to answer and was dismissed from his appointment on June 18, 1964.

On July 8, 1964, the plaintiffs brought a class action against a large part of the educational hierarchy of the State of New York, seeking an injunction against enforcement of the civil statutes concerning employment of subversives and of the regulations and procedures used to implement those statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three-judge district court. 233 F. Supp. 752 (W. D. N. Y., 1964). The Court of Appeals for the Second Circuit reversed and directed that the case be heard before a three-judge court. 345 F. 2d 236 (2 Cir., 1965).

I. *The Constitutionality of the State's Objective.*

The plaintiffs argue in part that the complex of laws, regulations, and procedures under attack has no constitutionally valid objective—that they infringe upon freedom

of expression without being justified by any legitimate state interest.

The Supreme Court in the *Adler* case, considering statutes the predecessors of the ones now in question, described the importance of the state interest in preventing the use of the educational system as a platform for urging students to overthrow government by violent means:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."
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> *Adler v. Board of Education,* 342 U. S. 485, 493 (1952).

The Supreme Court has not changed its recognition of the importance of this state interest in recent cases. In 1958, it quoted the above language from *Adler* with approval, in upholding the dismissal for "incompetency" of a Pennsylvania school teacher who refused to answer a question as to his activities in the Communist Party. *Beilan v. Board of Public Education,* 357 U. S. 399 (1958). In *Barenblatt v. United States,* 360 U. S. 109 (1959), the Court upheld the contempt conviction of a former teaching fellow at the University of Michigan, based on his refusal to answer questions of a congressional committee as to his past and present membership in the Communist party. The Court indicated that Congress had a legitimate interest in "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities * * * persons and groups committed to furthering the objective of overthrow." 360 U. S. at 129. In

Cramp v. Board of Public Instruction, 368 U. S. 278 (1961), the Court struck down as unconstitutionally vague a Florida statute requiring state employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party"; but the Court did not "question the power of a State to safeguard the public service from disloyalty." 368 U. S. at 288. Nor does the recent decision of *Baggett v. Bullitt*, 377 U. S. 360 (1964), cast any doubt upon the power of a state to act to prevent the incitement of violent overthrow on university campuses.

The plaintiffs argue that the legitimate state objective recognized by the Court in *Adler* is not present here, since the teachers here hold positions at universities rather than at public schools. The argument appears to be based upon the comparative maturity of mind of the university student, which entitles him to the privilege of exposure to conflicting political philosophies. But as the American Association of University Professors wrote in their *amicus* brief in *Barenblatt, supra*, a case involving a university teacher, "The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger situation, within which the interest in national self-preservation * * * also prominently appear[s]." Brief, p. 24. It would not be constitutional to prevent the *teaching* of Communist philosophy at the university level; but it would be dangerously anomalous to proscribe the *advocacy* of violent overthrow of government in all parts of the United States, see *Dennis v. United States*, 341 U. S. 494 (1951), except in the breeding-grounds of the future leaders of the nation. The interest in national self-preservation—"the ultimate value of any society," *Dennis* at 509—applies to the university campus as well as to the rest of our society.

II. *The Constitutionality of the Means Used to Attain the State's Objective.*

The plaintiffs maintain that even if the statutes and regulations under attack assert a legitimate state objective, they do so in a manner which unduly restricts other interests protected by the Constitution. The plaintiffs invoke a variety of constitutional clauses in support of their position.

A. The Ex Post Facto Clause.

An *ex post facto* law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings v. Missouri*, 71 U. S. 277, 325-26 (1867).

In the present case, the plaintiffs either have been dismissed or are threatened with dismissal for failure to answer questions put to them under procedures designed to implement § 3022 of the Education Law, which was made applicable to colleges in 1953. Before being dismissed or threatened with dismissal, the plaintiffs were repeatedly told the purpose of the questions, the statutory basis for the questions, and the possibility that dismissal proceedings would be started if they failed to answer the questions. The proscription of their conduct preceded the conduct itself, so that the *ex post facto* clause does not apply. See *Garner v. Board of Public Works*, 341 U. S. 716, 721 (1951), in which the Court rejected an argument that dismissal of municipal employees for failure to take an oath was *ex post facto* punishment, with the observation that the activity covered by the oath had been proscribed years before the employees were asked to take the oath.

B. The Bill of Attainder Clause.

"Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment of them without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett,* 328 U. S. 303, 315-16 (1946). The plaintiffs contend that Section 3022 of the Education Law, coupled with the Regents' regulations under that section and Section 105(1)(c) of the Civil Service Law, constitute a bill of attainder, since these provisions single out as ineligible for employment in state schools members of the Communist Party of New York and of the Communist Party of the United States. A similar argument was made and rejected in the *Adler* case.

The plaintiffs put particular reliance on *United States v. Brown,* 381 U. S. 437 (1965), in which the Court held unconstitutional as a bill of attainder a statute making it criminal for anyone "who is or has been a member of the Communist Party" to serve as an officer of a labor union within five years of the termination of his membership in the Communist Party. However, the statute attacked in the *Brown* case differs fundamentally from the statutes and regulations challenged here in the nature of the part played by the legislature in determining the underlying facts from which adverse consequences would follow. Assuming without deciding that dismissal from state employment can constitute "punishment"—a question left open in *Garner,* 241 U. S. 716 at 721 (1951) and not touched upon in *Brown*—the bill of attainder clause only forbids "punishment" imposed by a legislature as a result of "trial by legislature." *Brown,* 381 U. S. at 442. It is the unfairness of trial by a large body "peculiarly susceptible to popular clamor," 1 Cooley, Constitutional Limita-

tions, 536-37 (8th ed. 1927) that underlies the bill of attainder clause. The Court in *Brown* faced a statute involving just such a "trial by legislature"—a statute which specified the Communist Party by name, and made it a crime—automatically and incontestably—for a Party member to hold union office.

In the present case, disqualification from employment in the state schools did not follow automatically from a legislative determination that the Communist Party was a bad organization. Section 3022 of the Education Law provided that the Board of Regents shall, after full notice and hearing, make a list of organizations which it finds advocate the doctrine that government should be overthrown by force, violence, or other unlawful means. It was only after extensive hearings that the Board of Regents lists two organizations under Section 3022; the Communist Party of New York and the Communist Party of the United States. These determinations were subject to judicial review under Article 78 of the Civil Practice Act, now Article 78 of the Civil Practice Law and Rules. *Thompson v. Wallin,* 301 N. Y. 476, 493, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education,* 342 U. S. 485 (1952).

Section 105(1)(c) of the Civil Service Law, which makes membership in either the Communist Party of New York or that of the United States "*prima facie* evidence" of disqualification for the state civil service, was based not on an original determination by the state legislature of the aims of the Communist Party, but upon the findings of the Board of Regents under Section 3022 of the Education Law. The preamble to the amendment incorporating the reference to the two parties makes clear that the purpose of the reference was to bring Section 105 into harmony with the determinations of the Board of Regents

under Section 3022. N. Y. Sess. Laws 1958, c. 503, § 1.[2]

Again unlike the statute struck down in *Brown*, Sections 105(1)(c) of the Civil Service Law and 3022 of the Education Law make membership in the Communist Party only "*prima facie* evidence of disqualification" from state employment. The presumption is rebuttable; at a hearing, the employee "may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy." *Lederman v. Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education*, 342 U. S. 485 (1952). As the New York Court of Appeals stated in *Thompson v. Wallin*:

> "The phrase 'prima facie evidence of disqualification' * * * imports a hearing at which one who seeks appointment to or retention in a public school position

[2] The text of the preamble is as follows:

> *"Declaration of legislative intent.*
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> The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law [now Section 105 of the Civil Service Law] with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list
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> 'organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law';
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> that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

> shall be afforded an opportunity to present substantial evidence contrary to the *prima facie* evidence * * *. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence."

301 N. Y. 476 at 494, 95 N. E. 2d 806 at 814-15. See also *Hughes v. Board of Higher Education,* 309 N. Y. 319, 130 N. E. 2d 638 (1955).

The disqualification of a teacher under these laws, in short, is not the result of a "legislative trial". The legislature in the first instance—in enacting Section 3022 of the Education Law—did nothing more than, in the language of *Brown,* 381 U. S. at 450, "set forth a generally applicable rule" as to the characteristics of organizations, membership in which should be evidence of disqualification. The determination of what organizations possessed those characteristics was left to an administrative body, to be made after notice, hearing, and opportunity for judicial review. The case closely resembles *Communist Party v. Subversive Activities Control Board,* 367 U. S. 1 (1961), in which the Court, holding that the Subversive Activities Control Act of 1950 was not a bill of attainder, stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities," 367 U. S. at 84-85, and pointed out that the initial findings under the Act "must be made after full administrative hearing, subject to judicial review * * *." *Id.* at 87.

If anything, the statutes now under attack are less like a bill of attainder than the act held constitutional in *Communist Party v. Subversive Activities Control Board,* since the New York statutes provide opportunity for hearing and judicial review not only for the organizations listed,

but also for their members. In short, in terms of a recent analysis of the history and purpose of the bill of attainder clause, the New York legislature here laid down "rules of general applicability", leaving "the job of application to other tribunals." Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L. J. 330, 347, 350 (1962).

C. The Due Process Clause.

Plaintiffs' principal challenge to the New York statutes and procedures is based on the protection afforded to free speech by the First Amendment, applicable to the states under the Fourteenth Amendment. Plaintiffs maintain that the New York laws and procedures impinge upon the rights of freedom of speech, thought, and expression more than is necessary to protect the state from violent overthrow, both by being too broad and vague, and by imposing an unfair burden on those who may be adversely affected, requiring them to justify their conduct.

1. Procedural Due Process and Speiser v. Randall.

Plaintiffs' "burden of justification" argument rests in large part on *Speiser v. Randall*, 357 U. S. 513 (1958), in which the Court held to be against due process a California statute which required veterans to file oaths declaring that they did not advocate the overthrow of government by force, violence, or other unlawful means, before they could receive a state tax exemption. The essence of the Court's opinion was that by putting the burden of taking the first step and of proving eligibility on the applicants, the statute made it more likely that the exemption would be denied in borderline cases, and therefore that "legitimate utterance will be penalized." 357 U. S. at 526. The Court distinguished the *Garner* and *Douds* cases, in which

oaths were upheld as valid prerequisites to state employment and union office, by pointing out that those cases "concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety," *id.* at 527, and that in those cases persons by taking the oaths could retain their positions subject to further proceedings in which the government would have the burden of proof. The Court also distinguished the New York statutes upheld in *Adler*, on the grounds that under those statutes "public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence." 357 U. S. at 528 n. 8.

Later decisions have made clear that *Speiser* does not create a rule of law that a potential suspect in an area concerning freedom of speech must never be called upon to justify his conduct. *E.g., Nelson v. County of Los Angeles,* 362 U. S. 1 (1960), upholding discharges of county employees based upon their refusal to answer questions concerning subversive activities put to them by a congressional subcommittee; *Konigsberg v. State Bar,* 366 U. S. 36 (1961) and *In re Anastaplo,* 366 U. S. 82 (1961), holding that admission to a state bar could be denied on the basis of an applicant's refusal to answer questions concerning Communist activities. Instead, *Speiser* holds that in a case concerning First Amendment freedoms, the burden of proof must rest upon the attacker as much as possible, consonant with the protection of the legitimate interest asserted by the attacker.

In the present case, the university requirement that all teachers sign "Feinberg certificates" may have raised problems under *Speiser,* although apparently the teachers could retain their positions by signing the certificates, sub-

ject only to further proceedings in which the state would bear the burden of proof. But the university has discontinued its reliance on the certificate procedure, as of June 10, 1965. The state now investigates prospective appointees by asking the candidate and others questions concerning his compliance with the laws. The candidate is given a chance to explain his doubts, not provided under the certificate procedure. Absolute refusal to answer is made grounds for refusal to appoint; but this seems reasonable, in light of the opportunity to explain. Persons employed before June 10, 1965, shall not be deemed disqualified "solely by reason of" their failure to sign the Feinberg certificate. The State thus would have the burden of showing violations of the statutes, following the statutory procedures for dismissal as to teachers with tenure.

Plaintiffs maintain that teachers serving on contract and without tenure are denied procedural due process, since they are guaranteed by the Regents' regulations only "such hearings * * * as [the school authorities] deem the exigencies warrant * * *." In particular, plaintiffs point to the dismissal of Starbuck as evidence that the state will not give an adequate hearing to teachers without tenure.

It appears that after Starbuck failed to answer the question about subversive activities on his employment form, he was told that he must answer it yes or no, and could explain if he answered yes. He did not answer, and was dismissed. We understand the law of New York to be in accordance with the advice given to Starbuck by the university officials. Although a teacher without tenure, Starbuck would have had an opportunity to explain and a right to a full hearing on whether or not he had violated the substantive provisions of the law, if he had answered the question yes. *Hughes v. Board of Higher Education,*

309 N. Y. 319, 130 N. E. 2d 638 (1955); *Lederman v. Board of Education*, 276 App. Div. 527, 96 N. Y. S. 2d 466 (2d Dep't 1950), *aff'd sub nom. Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education*, 342 U. S. 485 (1952). In light of this opportunity for explanation and a hearing, Starbuck cannot complain of lack of procedural due process. His dismissal was for insubordination in refusing to answer a relevant inquiry, and the Constitution does not require any hearing on one's reasons for refusal to cooperate with a relevant inquiry. See *Nelson v. County of Los Angeles*, 362 U. S. 1 (1960); *Konigsberg v. State Bar*, 366 U. S. 36 (1961); and *In re Anastaplo*, 366 U. S. 82 (1961). *Slochower v. Board of Education*, 350 U. S. 551 (1956) may be distinguished, since in that case the Court found no necessary connection between Slochower's refusal to answer questions concerning activities twelve years before, put to him not by a school board but by a congressional committee, and his unfitness for service in the New York schools. Here Starbuck refused to answer a question put to him by school authorities concerning whether or not he presently advocated the violent overthrow of government.

Plaintiffs also assert that the provisions of Section 3022 of the Education Law and Section 105(1) of the Civil Service Law which make membership in the Communist Party *prima facie* evidence of disqualification for employment by the state are contrary to procedural due process. The same argument was before the Supreme Court in *Adler*, and the Court decisively rejected it:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of gov-

ernment by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has a full opportunity to rebut it * * *. Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

342 U. S. 485, 494-96 (1952).

In support of its position, the Court looked to the interpretation of the statute by the New York courts below. *Lederman v. Board of Education,* 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson v. Wallin, supra,* 806, 815 (1950). The courts of New York not having changed their interpretation of the presumption contained in these statutes, see *Hughes v. Board of Higher Education,* 309 N. Y. 319, 130 N. E. 2d 638 (1955), there is no reason to hold the presumption violative of due process today.

2. "Vagueness"

The plaintiffs maintain that breadth of language renders the statutes under attack unconstitutional, because it tends to deter legitimate expression as well as expression which the State is justified in regulating. It is, of course, true that strict standards of draftsmanship are to be applied to a statute having a potentially inhibiting effect on speech; "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U. S. 147, 151 (1959). However, we must examine the present statutory complex, as implemented by the Regents' regulations and as inter-

preted by the New York courts, to see whether it has a tendency to deter legitimate discussion and activities as well as to carry out the permissible objective of preventing the advocacy of violent overthrow of government.

Subsection 2 of Section 3022 of the Education Law provides that the Board of Regents shall list organizations found to "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown * * * by force" or found to "advocate, advise, teach, or embrace the duty, necessity, or propriety of adopting any such doctrine * * *." Section 105(1) of the Civil Service Law lists three causes for ineligibility for employment in the state civil service; wilfully advocating, advising, or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine.

Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should "be overthrown * * * by force" is a basis for adverse consequences under these sections. Not innocent membership in the Communist Party, in contrast to what could have been deterred by the oath struck down in *Weiman v. Updegraff*, 344 U. S. 183 (1952); only knowing membership in an organization advocating the violent overthrow of government is grounds for ineligibility for state employment. *Lederman v. Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub*

nom. Adler v. Board of Education, 342 U. S. 485 (1952); see also *Adler v. Wilson*, 282 App. Div. 418, 123 N. Y. S. 2d 655 (3d Dept. 1953).

Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the "duty, necessity, or propriety" of adopting the doctrine of violent overthrow, before he can be disqualified from state employment. Finally, the sections just described do not deter representing the Communist Party in a lawsuit, or defending the constitutional rights of the Communist Party in a newspaper article, or voting for a candidate also supported by the Communist Party—the legitimate activities which the Supreme Court feared might be deterred by the broad oaths struck down in *Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961) (state employees had to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party") and in *Baggett v. Bullitt*, 377 U. S. 360 (1964) (state teachers had to swear, among other things, that they did not aid any person to aid in the commission of any act intended to alter the constitutional form of government by force or violence).

The Supreme Court in *Baggett* made clear that narrowly drawn statutes aimed wholly at the control of subversive activities would be upheld as constitutional. The Court distinguished the broad oath before it in *Baggett* from the oath upheld in *Gerende v. Board of Supervisors*, 341 U. S. 56 (1951), on the grounds that the *Gerende* oath required a candidate for state office to swear only that he is not engaged "in one way or another in the attempt to overthrow the government by force or violence," and that he is not knowingly a member of an organization engaged in such an

attempt. The sections of the New York statutes just analyzed proscribe no more than the oath upheld in *Gerende*, and seem less questionable even than *Gerende* since they place the burden of taking the first step and the burden of proof on the official challenging eligibility. The Supreme Court upheld these sections, 3022 of the Education Law and 105(1) and (2) of the Civil Service Law (the last two subsections then being known as 12(a) of the Civil Service Law), in *Adler v. Board of Education*, 342 U. S. 485 (1952), although the sections were attacked on grounds of vagueness at that time. We see no reason to change the result of that case.

The remaining sections of the statutes under attack seem at first glance more general. Section 3021 of the Education Law provides for the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" while employed in the school system. Section 105(3) of the Civil Service Law provides for the removal of civil servants from office for "treasonable or seditious" words or acts.

However, the 1958 amendments to section 105(3) greatly restricted the scope of that subsection. N. Y. Sess. Laws 1958, ch. 790, sec. 105. "Treasonable words or acts", for the purpose of 105(3), now must come within the definition of "treason" in Section 2380 of the Penal Law:

> "1. Leving war against the people of the state within this state; or, 2. A combination of two or more persons by force to usurp the government of the state or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or, 3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed by the constitution of the United States, as giving to such enemies aid and comfort within the state or elsewhere."

We do not understand the plaintiffs to challenge this definition of treason on grounds of vagueness; it is as good as can be done, and resembles the definition used in Article III, section 3, of the Federal Constitution. Even the third clause of the New York definition is narrow, having been construed to apply only in wars against foreign enemies waged by the State of New York separately from the United States. *People v. Lynch,* 11 Johns, R. 549 (1814).

Similarly, "seditious acts and utterances", for the purpose of section 105(3), now must come within the definition of "criminal anarchy" in section 160 of the Penal Law:

> "the doctrine that organized government should be overthrown by force or violence or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."

This is a definition closely connected with the state's legitimate interest in self-preservation, and as such is within the realm of the constitutional under *Gerende, Cramp,* and *Baggett.* We note in passing that the 1958 amendment to section 105(3) refers to section 160 of the Penal Law, entitled "Criminal anarchy defined". The looser language of section 161 of the Penal Law, entitled "advocacy of criminal anarchy", is not now before us, although the plaintiffs seem to wish that it were.

The 1958 amendments of section 105(3) did not, by their terms, extend to the parallel language of section 3021. But the history of the two sections—born as successive sections of an act of 1917, N. Y. Sess. Laws 1917, ch. 416, secs. 2 and 3—together with the identity of language in the two sections, indicates that the two must be construed *in pari materia.* The presumption that statutes "will be construed in such a way as to avoid the constitutional question presented", *Baggett v. Bullitt,* 377 U. S. 360, 375 (1964), reinforces us in the conclusion that the words

"seditious or treasonable acts or words" in section 3021, like their identical twins in section 105(3), must be defined by reference to sections 2380 and 160 of the Penal Law. When this is done, sections 3021 and 105(3)—like the separable but related Sections 3022 and 105(1) and (2)—become sharply defined, and can withstand any possible attack on grounds of vagueness.

III. Conclusion

We find constitutional section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents, and the procedures under these statutes and rules now in effect at the State University of New York at Buffalo. We accordingly give judgment for the defendants, and deny the plaintiffs all the relief requested by them.

/s/ LEONARD P. MOORE,
U. S. C. J.,

/s/ HAROLD P. BURKE,
U. S. P., U. S. D. C.,

/s/ JOHN O. HENDERSON,
U. S. D. J.

January 5th, 1966.

Decision and Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 10994

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

Plaintiffs,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Defendants.

LIPTSITZ, GREEN AND FAHRINGER,
(RICHARD LIPSITZ, of counsel),
Buffalo, New York,
Attorneys for Plaintiffs.

JOHN C. CRARY, JR.,
Albany, New York,
Attorney for Defendants, Board of Trustees of the State University of New York; State University of New York at Buffalo; Clifford C. Furnas, and J. Lawrence Murray.

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
(RUTH KESSLER TOCH, of Counsel),
Attorney for remaining Defendants.

The plaintiffs, employees or former employees of the State University of New York at Buffalo, move for an order convening a three judge court pursuant to Title 28 U. S. C. § 2281.

Essentially, plaintiffs seek to have sections 3021 and 3022 of the New York Education Law, section 105 of the New York Civil Service Law, section 244, article XVIII of the Rules of the Board of Regents of the State of New York, and certain other certificates, oaths and questionnaires promulgated under the authority of the aforementioned statutes, declared unconstitutional and of no force and effect. Unless no substantial federal question is presented, a three judge court must be convened.

As was stated by the Supreme Court in *California Water Service Co. v. City of Redding*, 304 U. S. 252, 255 (1938):

> "[t]he lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] Court as to foreclose the subject."

In large part the issues raised by the plaintiffs' complaint were laid to rest by the Supreme Court's decision in *Adler v. Board of Education*, 342 U. S. 485 (1952). Viewing New York's clarification of section 3021 and the safeguards of individual rights found in New York's statutory scheme in light of the Supreme Court's decisions in *Garner v. Los Angeles Board*, 341 U. S. 716 (1951); *Adler v. Board of Education, supra; Beilan v. Board of Education*, 357 U. S. 399 (1958); *Lerner v. Casey*, 357 U. S. 468 (1958); *Nelson v. Los Angeles County*, 362 U. S. 1 (1960); *Konigsberg v. State Bar*, 366 U. S. 36 (1961); *In re Anastaplo*, 366 U. S. 82 (1961); *Cramp v. Board of Public Instruction*, 368 N. S. 278 (1961); and *Baggett v. Bullitt*, 377 U. S. 360 (1964), the court finds no substantial federal question

raised by the remainder of the plaintiffs' complaint. Accordingly, plaintiffs' motion is denied and plaintiffs' complaint is dismissed. So ordered.

JOHN O. HENDERSON,
United States District Judge.

Dated: September 2, 1964.

Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

Appellants,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

No. 359, Docket 29287.

Argued March 8, 1965.

Decided May 3, 1965.

Richard Lipsitz, Buffalo, N. Y. (Lipsitz, Green & Fahringer, Buffalo, N. Y., on the brief), for appellants.

Ruth Kessler Toch, Asst. Sol. Gen. (Louis J. Lefkowitz, Atty. Gen. of New York, on the brief; Paxton Blair, Sol. Gen., of counsel), for Board of Regents, Arthur Levitt, Department of Civil Service, Civil Service Commission, Mary Goode Krone and Alexander A. Falk, appellees.

John C. Crary, Jr., State University Counsel, Albany, N. Y. (Richard A. Foster and David L. Segel, Albany, N. Y., of counsel) for Board of Trustees of State University of New York, State University of New York at Buffalo, Clifford C. Furnas and J. Lawrence Murray, appellees.

Magavern, Magavern, Lowe & Beilewech, Buffalo, N. Y., submitted brief, *amici curiae* on behalf of American Ass'n of University Professors and American Civil Liberties Union (James L. Magavern, Buffalo, N. Y., Bernard E. Harvith, New York City, Herman I. Orentlicher, Kitty Blair Frank, Washington, D. C., and Melvin L. Wulf, New York City, of counsel).

Before SMITH and MARSHALL, Circuit Judges, and METZNER, District Judge.*

MARSHALL, Circuit Judge:

Appellants, faculty members of the State University of New York at Buffalo, commenced a class action in the United States District Court for the Western District of New York under 28 U. S. C. A. §§ 2281, 2284 for the convening of a three-judge district court to pass on the constitutionality of Sections 3021 and 3022 of the New York Education Law, McKinney's Consol. Laws, c. 16, Section 105 of the New York Civil Service Law, McKinney's Consol. Laws, c. 7, and Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York as well as the required certificates and oaths.

* Sitting by designation.

Appellants refused to sign loyality certificates[1] prepared by the Board of Regents pursuant to Section 3022.[2] The

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[1] "STATE UNIVERSITY OF NEW YORK AT BUFFALO

"CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * *

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rule of Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

..... Date .....Signature"

"CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum, are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date .....Signature"

[2] "§ 3022. Elimination of subversive persons from the public school system

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned

(Footnote continued on following page)

complaint is an attack upon the constitutionality of the entire system set up pursuant to the statute requiring the promulgation of the rules and the reference to the statutes in the certificates in question. The claim is that the laws are unconstitutionally vague in violation of the Fourteenth Amendment and that they inhibit vital thought and speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment.

[1] Judge Henderson, finding no substantial federal question presented, refused to convene a three-judge court and dismissed the complaint (233 F. Supp. 752). Judge Henderson was correct in his general statement of the law: "Unless no substantial federal question is presented, a three judge Court must be convened." Idlewild Liquor

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(Footnote continued from preceding page)

and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a [now section 105] of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a [now section 105] of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authorty authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the publice schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

Corp. v. Epstein, 370 U. S. 713, 715, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962). It is likewise true that "the lack of substantiality in a federal question" may appear from previous decisions of the Supreme Court, California Water Serv. Co. v. City of Redding, 304 U. S. 252, 255, 58 S. Ct. 865, 867, 82 L. Ed. 1323 (1938). However, we are not convinced that the issues raised here were determined in Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952). We, therefore, reverse and remand with instructions to convene a three-judge court.

While Adler held Section 3022 not to be unconstitutional as applied to teachers in the public schools of New York, it specifically refused to pass upon the constitutionality of section 3021 (342 U. S. at 489, 496, 72 S. Ct. 380) and certainly did not consider the application of section 3022 to university faculty members. The certificate here in question and several statutory amendments, such as Section 105(3) of the Civil Service Law, are all subsequent to Adler. Moreover, there is a significant similarity between the state laws in question here and those held unconstitutional in Baggett v. Bullitt, 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 377 (1964). *Cf.* also Dombrowski v. Pfister, 85 S. Ct. 1116 (April 26, 1965).

[2] Appellees rely heavily upon the statement in Adler that, "It is equally clear that they [public school teachers] have no right to work for the State in the school system on their own terms," 342 U. S. 492, 72 S. Ct. 384. However, the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. In less than a year after Adler the Supreme Court clearly limited its language in Adler:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the

> public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U. S. 183, 192, 73 S. Ct. 215, 219, 97 L. Ed. 216 (1952).

See also, Baggett v. Bullitt, 377 U. S. 360, 34 S. Ct. 1316 (1964); Torcaso v. Watkins, 367 U. S. 488, 81 S. Ct. 1688, 6 L. Ed. 2d 982 (1961); Cramp v. Board of Public Instruction, 368 U. S. 278, 288, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); Shelton v. Tucker, 364 U. S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); Slochower v. Board of Higher Education, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956); Willcox, Invasions of the First Amendment Through Conditioned Public Spending, 11Cornell L. Q. 12 (1955).

In Wieman the Court "noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents." 344 U. S. at 186, 73 S. Ct. at 216, and as late as 1964 the Court repeated the identical statement in Baggett, *supra*, 377 U. S. at 366, 84 S. Ct. at 1319. This case no less should not be dismissed as lacking in substance. We, therefore, reverse the judgment below and remand with instructions to the District Court to convene a three-judge district court pursuant to 28 U. S. C. A. § 2284.

Statutes and Administrative Rules Involved

SUBDIVISION 1 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Ineligibility of persons advocating overthrow of government by force or unlawful means," and provides:

> "No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as

superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States, or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

Subdivision 2 of Section 105, New York Civil Service Law, is captioned, "A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the Supreme Court, why a hearing on such charges should not be had," and provides:

"Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

SUBDIVISION 3 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Removal for treasonable and seditious acts or utterances," and provides:

"A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law."

SECTION 3021, NEW YORK EDUCATION LAW, is captioned, "Removal of superintendents, teachers, and employees for treasonable or seditious acts or utterances," and provides:

"A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

SECTION 3022, NEW YORK EDUCATION LAW, is captioned, "Elimination of subversive persons from the public school system," and provides:

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualifica-

tion for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

ARTICLE XVIII, SECTION 244, RULES OF THE BOARD OF REGENTS (Adopted July 15, 1949), is captioned, "Subversive Activities", and provides:

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than Sep-

* Now section 105.

tember 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes

* Now section 105

in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted."

SECTIONS 160 and 161 of the NEW YORK PENAL LAW provides:

"SECTION 160. Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"SECTION 161. Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, without intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

Feinberg Certificates

A.

Sitting by designation.

1. STATE UNIVERSITY OF NEW YORK AT BUFFALO

"CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the

violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * *

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rule on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature"

B. "CERTIFICATE

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the

State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature"

Resolutions of the Board of Trustees of the State University of New York

EXHIBIT

Resolved that Resolution 65-100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56-98 adopted on October 11, 1956, incorporated into the Policies of the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded,* and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of

the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date.

Laws of 1958, Chapter 503

Section 1. Declaration of legislative intent. The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law"; that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the State of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

SUPREME COURT

MAY 16 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1965~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH MAUD and GEORGE E. STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION AND BRIEF TO DISMISS FOR BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS AND J. LAWRENCE MURRAY, APPELLEES, AND APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH MAUD and GEORGE E. STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

Motion to Dismiss Appeal

Appellees move to dismiss Appellants' appeal upon the ground that there is not presented any substantial Federal question

BRIEF TO DISMISS FOR BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS AND J. LAWRENCE MURRAY, APPELLEES

Statement of the Case

Four members of the academic community of the State University of New York at Buffalo refused to sign a certi-

ficate which would inform the State University as to present or past membership in the communist party. The fifth appellant, Starbuck, refused to answer questions as to subversive activities on his employment form. Appellants initiated this action to enjoin the University officials from acting upon their refusal. The refusal to sign, itself, was based upon principle, that the certificate and underlying statutes and rules involved are unconstitutional; there is no indication that any of the appellants are, in fact, members of any communist party.

The certificate is an implementation by the State University of a series of statutes of New York State denying State employment to those who advocate the violent overthrow of the government of the United States or of the State of New York or any political subdivision thereof. These statutes, rules, certificates and the other procedures involved are set forth in the Appendix.

Request for a three-judge court was denied in the initial stages of the action. Instead, the single district judge dismissed the complaint for want of a substantial federal question. This was appealed to the Circuit Court of Appeals, which court allowed the convening of a three-judge court on the grounds that there were substantial constitutional issues. The present appeal is from the decision of the three-judge court dismissing the action.

ARGUMENT

I. This appeal presents no substantial federal constitutional question.

The purpose of the certificates and questionnaires is for eliciting information. One who refuses to sign and explain

why he refuses is not automatically denied any of his employment rights. Appellants in this case refused to cooperate, actually. They would neither sign nor explain their refusal actions. The presence of the certificate or the questionnaire alerts the University officials that a situation may exist where further inquiry is necessary to determine whether the employee or prospective employee is a member of a communist party because he actively advocates that part of communist doctrine that government can only be changed by force and violent overthrow. If he personally so advocates, he cannot be employed by the State of New York.

The statutes involved here make proof of membership in an organization that advocates the violent overthrow of the government *prima facie* evidence of disqualification for employment. *(Education Law,* § 3022, subdiv. 2). The burden of proving a personal and individual advocacy in such violent overthrow remains with the state, however. This interpretation was made clear by the New York Court of Appeals in *Thompson* v. *Wallin,* 300 N. Y. 476, 494 (1950) in which the court wrote:

> "Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until 'after inquiry, and after such notice and hearing as may be appropriate'. The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in an organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): 'Presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disap-

pears, and unless met by further proof there is nothing to justify a finding based solely upon it.' Thus the phrase '*prima facie* evidence of disqualification', as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 make provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, sec. 12-a, subdiv. d). Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State."

Thompson v. *Wallin* (1950), 301 N. Y. 476, 494.

Thompson v. *Wallin* was affirmed under the name *Adler* v. *Board of Education*, 342 U. S. 485 (1952). The Supreme Court of the United States accepts interpretation of state statutes by the highest state court concerned as being correct and applicable as that state's law.

Not all of the statutes, rules and procedures that give rise to this action were in existence before the court in the *Adler* case, *supra*, subdivision 3 of section 105 of the Civil Service Law (*infra*, appendix), the second paragraph of subdivision 1(c) of section 105 of the *Civil Service Law* (*infra*, appendix), the expanded section 3022 of the *Education Law* making it applicable to institutions of higher edu-

cation as well as public schools (*infra*, appendix), and the trustees' certificates (*infra*, appendix), have all come into existence since the *Adler* decision. None of the post-*Adler* state activity changes the fundamental complex aimed at weeding out those who advocate the violent overthrow of the government, however. Subdivision 3 of section 105 of the *Civil Service Law* provides for removal from state employ those who make treasonable or seditious acts or utterances as defined in the Penal Law. (§§ 160 and 161 of the *Penal Law, infra*, appendix). The second paragraph of subdivision 1(c) of the *Civil Service Law* makes statutory the finding of the Board of Regents, after investigation, that membership in the national or state communist party constitutes *prima facie* evidence of disqualification for appointment to or retention of state employment. The trustees' certificates contained and governed as they are by the state court's interpretation of the underlying statutes implement action on no broader scope than if they had been required before the *Adler* decision.

Since the additions to state law and procedure since the *Adler* decision do not affect or change the fundamentals of the problem, these new adjuncts are still restricted, governed and guided by the interpretation of the state court in the *Thompson* v. *Wallin* decision *(supra)*. Since the Supreme Court of the United States has already reviewed the statutory-rules-procedure complex in the appeal of *Thompson* v. *Wallin* in the *Adler* decision, there is no substantial federal question before this court under the present appeal.

II. The specific questions of unconstitutionality raised by the appellants have no factual basis.

a. The Ex-Post Facto Argument

All statutes and procedures involved in this action were in existence before the appellants were asked to comply with them. No rights of the appellants were affected or could be affected by any of their actions or activities that took place prior to the existence of these statutes and procedures. The query as to past membership in the communist parties in the certificate is only to prompt the University as to the possible necessity of further inquiry to determine whether termination of such membership indicated a change of belief or was for more routine reasons. The state is still bound to the burden of proving a present personal advocacy for overthrow by force and violence. This methodology is acceptable. *Beilan* v. *Board of Public Education,* 357 U. S. 399 (1958).

b. The Bill of Attainder Argument

The only way the bill of attainder issue could arise in this action is by proposing that the membership in a communist party, as elicited by the certificate, is automatic grounds for dismissal or a refusal to employ. Since the state can be taken to a hearing and eventually to the state courts and in both forums be required to prove actual advocacy of violent overthrow, and since there is no aspect of association that can substitute for such proof, the spector of a bill of attainder has a specious base.

c. Vagueness

These statutes do not tell a man what he may do, only that he may not advocate the doctrine of violent overthrow. The statutes must be narrowly interpreted. *Baggett* v.

Bullitt, 377 U. S. 360 (1964). A state employee, subject to these statutes, may teach communist theory, may write in defense of communism, may edit communist literature, may distribute communist literature, may even take part in communist sponsored activities or meetings. No matter what his position in state employ, the only restriction on him is advocacy of violent overthrow. Such a picture can hardly place one in a state of uncertainty.

d. Comparison with Other Cases

The oath in *Baggett* v. *Bullitt,* 377 U. S. 360 (1964) condemned activity much more remote, to aid one aiding, compared to the facts of this action.

The decision in the case of *Elfbrandt* v. *Russell,* 34 U. S. L. Week 4347, April 19, 1966 was concerned with a statute denying the freedom of association; there is no such restriction in New York.

A state has a right to inquire into the qualifications and fitness for employment of its personnel or prospective employees. *Garner* v. *Los Angeles Board,* 341 U. S. 716 (1961), *Lerner* v. *Casey,* 357 U. S. 468, *Beilan* v. *Board of Education,* 357 U. S. 399; *Nelson* v. *Los Angeles,* 362 U. S. 1 (1960). This implies an inquiry of enough vigor to be effective.

e. The New University Procedure

The Board of Trustees of the State University of New York has adopted by resolution 65-100 (*infra,* appendix) a new procedure that eliminates the use of the trustees' certificate. There is now an informal discussion of the statutory complex that is a condition of employment. The discussion explores the meaning of the complex as well as ascertains whether the employee or prospective employee

is subject to any of the prohibitions involved. It is submitted that this is an improvement over an already acceptable procedure.

Such is the limited extent of the state's interest as shown by these statutes.

CONCLUSION

The appeal should be dismissed on the ground that it does not present any substantial federal question warranting this court to take jurisdiction, or, in the alternative, the decision of the United States District Court, Western District of New York, should be affirmed.

Respectfully submitted,

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APPENDIX

§ 105 of the N. Y. Civil Service Law. Subversive activities; disqualification

"1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

"(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

"For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in

the service of the state or of any city or civil division thereof.

"2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

"3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law.[1]; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law.[2] L. 1958, c. 790, eff. April 1, 1959; amended L. 1958, c. 503, § 2, eff. April 9, 1958."

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[1] See Penal Law, § 2380.

[2] See Penal Law, § 160.

§ 3021 of the New York Education Law: Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances

"A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

§ 3022 of the New York Education Law: Elimination of subversive persons from the public school system

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The

board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. Added L. 1949, c. 360, § 3; amended L. 1953, c. 681, § 1, eff. April 13, 1953."

SECTION 160 of the New York Penal Law: Criminal anarchy defined.

"Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

SECTION 161 of the New York Penal Law: Advocacy of criminal anarchy.

"Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by

force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

"3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, without intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

"4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine

"Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

ARTICLE XVIII, SECTION 244, RULES OF THE BOARD OF REGENTS (Adopted July 15, 1949), captioned, "Subversive Activities", and provides:

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a[3] of the Civil Service Law.

"a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's

[3] Now section 105.

academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

"b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

"d. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

"d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

"e. Following the determination required in subdivision d of this paragraph, the school authorities

shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

"2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a[4] of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

"3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed

[4] Now section 105.

by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

"4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted."

TRUSTEES' CERTIFICATES

A. "Certificate

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * *

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rule on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature"

B. "Certificate

"Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

"Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political

subdivision thereof is directed to confer with the President before signing this certificate.

"This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature"

RESOLUTION OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK (REPLACING TRUSTEES' CERTIFICATES "A" AND "B").

"*Resolved* that Resolution 65-100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56-98 adopted on October 11, 1956, incorporated into the Policies of the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure of New Academic Appointments therein referred to, be and the same hereby are, *Rescinded*, and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to

make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

"Further Resolved

"that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date."

SUPREME COURT

MAY 18 1966

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term 1965—No. ~~12256~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

Appellants,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL R. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

MOTION TO DISMISS APPEAL BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

LOUIS J. LEFKOWITZ
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The case presents no substantial Federal question.

This Court upheld the statute attacked in *Adler* v. *Board of Education*, 342 U. S. 485.

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Supreme Court of the United States

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BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL R. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

MOTION TO DISMISS APPEAL BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

Preliminary Statement

This motion to dismiss is by the Attorney General of the State of New York on behalf of the appellees on whose behalf the Attorney General appears. It is made upon the ground that the statute challenged has been upheld by this Court; that accordingly there is no reason for this

Court to take jurisdiction of this appeal and the appeal should be dismissed.

The appeal insofar as the specific appellants are concerned is being dealt with by Counsel to the State University of New York, on behalf of appellees Board of Trustees of the State University of New York, the State University of New York at Buffalo, Samuel R. Gould, Clifford C. Furnas and J. Lawrence Murray.

The Action; The Decision of the Court Below

This action was brought by five persons associated with the State University of New York at Buffalo for judgment declaring unconstitutional § 105 of the Civil Service Law of the State of New York, §§ 3021 and 3022 of the Education Law of the State of New York, commonly known as the Feinberg Law, and the Rules of the Board of Regents adopted pursuant thereto.

The complaint asked that the case be referred to a Three-Judge District Court to hear and determine the action. It also asked for injunctive relief, which was not granted by any Court by which the case has been heard.

Hon. John O. Henderson, District Judge, denied plaintiffs' motion and dismissed the complaint (233 F. Supp. 752 [Sept. 1964]) upon this Court's decision in *Adler* v. *Board of Education,* 342 U. S. 485 (1952).

The United States Court of Appeals, Second Circuit, on May 3, 1965 (345 F. 2d 236), reversed and remanded, with instructions to the District Court to convene a Three-Judge District Court.

A Three-Judge United States District Court for the Western District of New York (Hon. Leonard P. Moore,

United States Circuit Judge, Hon. Harold P. Burke, United States Chief District Judge, Hon. John O. Henderson, District Judge), was convened. The Court, after argument and briefs, on January 5, 1966, unanimously found constitutional the statutes and Rules of the Board of Regents attacked, as well as the procedures under these statutes and the rules in effect of State University of New York at Buffalo. The Court gave judgment for defendants accordingly and denied plaintiffs all the relief requested by them.

Circuit Judge Moore wrote an extensive opinion for the Court. (The opinion is not yet reported; copy attached as Appendix A to this brief.)

The Court's opinion is a model of thoroughness. *Seriatim* it considers every argument made by appellants. One after another it examines each of the cases cited by appellants and demonstrates the complete inapplicability to the Feinberg Law.

The Statutes Involved

The statutes involved are set forth in full as Appendix C to this brief.

Here we set forth their essence.

The Feinberg Law enacted in 1949 was designed to eliminate from the State's school system as teachers, persons who advocate the overthrow of the government by force, violence or unlawful means.

The law itself added a section, § 3022, to the Education Law. The first subdivision of the section directed the Board of Regents to adopt rules and regulations implementing pre-existing provisions of the Education Law and the Civil Service Law which disqualified for employment in

the school system or in the civil service of the state or in any school, college or educational institution by reason of advocacy of the overthrow of the government by force, violence or unlawful means, or treasonable or seditious utterances or acts.

The second subdivision of the section directs the Board of Regents, after inquiry, notice and hearing, to list organizations which advocate the overthrow of the government by force, violence or other unlawful means, and to provide by rules that membership in such organization is *prima facie* evidence of disqualification for employment in the school system.

In 1953 § 3022 was amended to add to schools within its coverage any college or other institutions of higher education owned and operated by the State (L. 1953, ch. 681). Section 12-a of the Civil Service Law (now § 105), which subdivision 1 of Education Law § 3022 implemented, had since 1939 included state colleges within its coverage.

On September 24, 1953, pursuant to § 3022 the Regents, after extensive hearings, listed the Communist Party of the United States and the Communist Party of the State of New York.

In 1958 § 12-a of the Civil Service Law was renumbered § 105 (L. 1958, ch. 790). In the same year § 23-a of the Civil Service Law (which is the same as § 3021 of the Education Law) was transferred to § 105 as paragraph 3 thereof. Both provide for removal from the civil service of the State (Civil Service Law § 105[3]) or from employment in the schools (Education Law § 3021) for treasonable or seditious utterances or acts. In 1958 there was also added to Civil Service Law § 105, subdivision 3, a provision defining "treasonable" and "seditious" as being the definition of these words in the Penal Law.

By chapter 503, section 1, of the Laws of 1958, the New York State Legislature took cognizance of the listing by the Regents pursuant to Education Law § 3022 of the Communist Party of the United States of America and of the State of New York and amended subdivision 1 (c) of § 12-a of the Civil Service Law (before the section was renumbered as § 105) to make membership in such organizations *prima facie* evidence of disqualification for office or position in the civil service.

ARGUMENT

The case presents no substantial federal question.

This Court upheld the statute attacked in *Adler* v. *Board of Education*, 342 U. S. 485.[1]

The Court has continued to hold as it did in *Adler* that there is no question of the power of a State to safeguard the public service from disloyalty.

No decision of the Court since *Adler* suggests that the Feinberg Law is other than a reasonable exercise of that power.

A.

The Feinberg Law was upheld by the Supreme Court of the United States in *Adler* v. *Board of Education*, 342 U. S. 485.

When the Feinberg Law was enacted, three litigations were brought approximately at the same time attacking its constitutionality. Ultimately, the law was upheld by

[1] The opinion of this Court and of the New York Court of Appeals (*sub nom Thompson* v. *Wallin*) are reproduced as Appendix B to this Brief.

this Court in *Adler* v. *Board of Education*, 342 U. S. 485.[2] In the complaints and in the briefs in the first Feinberg litigation in the Appellate Courts of New York and in this Court, every challenge to the constitutionality of the statute and every argument of unconstitutionality which appellants make here were made. Appellants make no argument, imagnative as counsel has striven to be, which was not made there, separately and cumulatively, by the numerous counsel who supported the attack. If conceivably any brief omitted an argument of unconstitutionality, another brief or briefs made it.

In this Court in addition to the brief for appellants, the American Civil Liberties Union filed a brief in their behalf. Between the two they argued that the law and Regents' Rules abridge freedom of speech and assembly (Appellant's Br., Point I); that the question before the Court is "whether the restriction imposed on government employees has reasonable relation to the public service" (*ibid.*); that the presumption created by the law is unreasonable and denies due process (Appellant's Br., Point II); that the law and the Regents' Rules are void because of vagueness (Appellant's Br., Point III); that the word "subversive" and the words "treasonable" and "seditious" in the law are vague (Appellant's Br., Point III; America Civil Liberties Union Br., Point I[4]); that the law and the Rules and the Commissioner's Memorandum invade the "spirit of free intellect" (American Civil Liberties Union Br., Point I[1]); that the law is in the nature of a bill of attainder and an *ex post facto* law (*ibid.*

[2] Of the other two actions, one of the appeals to this Court was abandoned; pursuit of the appeal in the other case was delayed and the New York Court of Appeals decision in that case was later affirmed by this Court (342 U. S. 951) on the basis of its decision in *Adler*.

Point I[2]); that the law constitutes guilt by association (*ibid.* Point I[3]); that the law adversely affects freedom of teaching and learning (*ibid.* Point I[6]); that the law amounts to a dragnet which may enmesh anyone "who * * * shows any interest in the form of government of other countries" (American Civil Liberties Union Br., p. 25); etc.

Appellants here, searching for something on which to argue that the *Adler* decision is not controlling, contend that Education Law § 3022 now covers academic personnel of the colleges by an amendment of 1953, and suggest that the law might have been relevant to protect children from teachers whom the statute would bar, but not college age students. The answer is that Civil Service Law § 12-a (now § 105), in which the Supreme Court in the *Adler* case found "no constitutional infirmity", applied when it was upheld in *Adler* to

> "any person * * * in the public service * * * as * * * teachers * * * in a state normal school or college, or any other state educational institution."

The reference in the *Adler* case to children in the public schools was because the Feinberg Law, implementing Civil Service Law, § 12-a, sparked the litigation and it enacted a procedure for employees in the public school system.

Moreover, the arguments on behalf of plaintiffs in the *Adler* case were directed to the curb by the statute on teachers *qua* teachers and not especially to those whom they taught. We quote from the American Civil Liberties Union brief as *amicus* in this Court, page 6:

> "*Scope of the Argument*
>
> The Amicus considers the Feinberg Law and its implementary rules and guides from the point of view of their effect upon civil liberties and academic freedom within the public schools, particularly in regard

to their effect upon teachers, students and the public school system, and *specifically upon teachers, who are the principal subjects of the Feinberg Law* and the administrative provisions thereunder." (Italics ours.)

This Court's opinion in the Adler case.

The Supreme Court characterized the *Adler* action as one for declaratory judgment that Civil Service Law § 12-a (now § 105), as implemented by the Feinberg Law, "be declared unconstitutional" (342 U. S. 485, at p. 491). The challenge was to "the Feinberg Law and the Rules promulgated thereunder" (*ibid.*).

The Court rejected the argument that the law and Rules constituted a deprivation of the right to free speech or assembly (342 U. S., at p. 492). It held that those whom it might affect would be denied appointment to or employment in the school system of the State "because first, of their advocacy of the overthrow of the government by force or violence, and secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence and known by such persons to have such purpose" (*ibid.*).

The constitutionality of denial of employment in the State school system for advocacy of overthrow of the government by force, and for membership in an organization proscribed in the law, was upheld because, as the Court said:

"We know of no rule, constitutional or otherwise, that prevents the state when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate. • • • Certainly such limitation is not one that the state may not make in the exercise of its police power to protect

> the schools from pollution and thereby to defend its own existence." (*ibid.* p. 493).

As appellants do here, so in the *Adler* case appellants argued that the presumption from membership in the proscribed organization bore no relation to qualification for employment. To this the Court said:

> "We do not agree. * * * We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion." (*ibid.* pp. 494, 495.)

Directing itself to the charge that the word "subversive", as used in subdivision 2 of § 3022 of the Education Law, was vague and indefinite, the Court said:

> "* * * the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of the government by force or violence." (*ibid.* p. 496.)

The conclusion by the Supreme Court was:

> "We find no constitutional infirmity in § 12-a of the Civil Service Law of New York or in the Feinberg Law which implemented it, * * *" (*ibid.* p. 496).

While the Court did not in *Adler* pass specifically upon § 3021 of the Education Law because it had not been attacked in the State Courts (342 U. S. at 489), the Court seemingly did not find it necessary to pass upon the constitutionality of the section in order to uphold § 3022, the Feinberg Law. Otherwise the Court would not have upheld § 3022 until § 3021 was properly before it.

As to the provisions of § 3021 that persons shall be removable from employment in the school system for treasonable or seditious utterances or acts, *People* v. *Gitlow*, 268 U. S. 652 [1925] affirming 234 N. Y. 132, affirming 195 App.

Div. 773, upheld conviction under the Penal Law provision which the counterpart of § 3021 (Civil Service Law § 105 [3]) incorporates for definition of "sedition".

There is thus no question of the constitutionality of § 3021 as written. It is not being applied at this time to anyone, nor has it been. Not by the State University. Not by the Regents. Nor has it been since 1949, when the Feinberg Law was enacted.

As to the contention that section 3022 was not considered in its application to university faculty in the *Adler* case, it is the fact, on the contrary, that the entire litigation which culminated in this Court's decision in *Adler* was the challenge to Civil Service Law § 12-a (as implemented by Education Law § 3022). And § 12-a (now § 105) has since 1939 been applicable to persons employed "in a state normal school or college or any other state educational institution". This Court's holding in *Adler* was that it found "no constitutional infirmity" "in § 12-a of the Civil Service Law * * * or in the Feinberg Law which implemented it" (342 U. S. at p. 496). As we have observed, *supra*, there is moreover no reason to draw distinction between teachers in universities and teachers in other schools in respect to the constitutionality of this law which applies to *teachers*—not to their students.

In accordance with its undeviating principle (*Seagram, et al.* v. *Hostetter, et al.*, ____ U. S. ____, April 19, 1966; *NAACP* v. *Button*, 371 U. S. 415, 432 [1963]), this Court in *Adler* accepted the construction of the Feinberg Law by the highest Court of New York as to the procedural due process provided by the Feinberg Law (342 U. S. at p. 495-6, quoting at some length on this subject the opinion of the New York Court of Appeals, 301 N. Y. at p. 494).

That construction of course stands, as the Court below said. The due process which the New York Court of Appeals held that law afforded—it has always afforded and affords today.

Fourteen years have passed since the Feinberg Law was upheld by this Court, 14 years of practical application and construction of the law by those who administer it. In those 14 years there has been no instance of due process having been denied under it, no instance of its application or use to curb "innocent activity [or] • • • belief • • • [or] speech" (Appellants' brief, p. 25). Appellants do not suggest that there has.

This is the simple demonstration that the Feinberg Law is what this Court and the Court of Appeals of New York in *Adler* said it is and does. Not what appellants here (as did appellants in the first litigation) theorize it is and does.

B.

Decisions of this Court since *Adler*.

The Court below in its opinion effectively analyzed all of the decisions of this Court since *Adler* which appellants invoke. All dealt with statutes totally different from the Feinberg Law. They struck down (or upheld) the particular statutes involved. What the Court said in each case was directed to the statute before it in the case. (This is also true of *Elfbrandt* v. *Russell*, decided by this Court April 18, 1966, subsequent to the decision below.)

Not one opinion since *Adler* has been critical of the decision. Indeed, where cited (*e.g.*, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288 [1961]) it has been as a viable decision for the viable principle of the *Adler* case.

CONCLUSION

The appeal should be dismissed upon the ground that it does not warrant the Court taking jurisdiction, or the decision below should be affirmed.

Dated: May 13, 1966.

Respectfully submitted,

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APPENDICES

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH M. MAUD, and GEORGE E. STARBUCK,

Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Defendants.

Civil Action File No. 10,994.

Before: Moore, *U. S. C. J.*, Burke, *Ch. J.* and Henderson, *U. S. D. J.*

Appearances:

Richard Lipsitz, of Lipsitz, Green and Fahringer, Buffalo, New York (Rosario J. DiLorenzo on the brief), for plaintiffs.

John C. Crary, Jr. (Richard A. Foster and David L. Segal on the brief), for defendants Board of Trustees—State University of New York, State University of New York at Buffalo, Clifford C. Furnas, Samuel B. Gould, and J. Lawrence Murray.

Ruth Kessler Toch (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), for defendants Board of Regents of the University of the State of New York, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk.

MOORE, *C. J.*

This suit challenges the constitutionality of Sections 3021 and 3022 of the New York Education Law, Section 105 of the New York Civil Service Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the procedures used under these various statutes and regulations. Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law, as they are now in effect, are set forth in the margin.[1]

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[1] *Civil Service Law*

§ 105. *Subversive activities: disqualification.*

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(Footnote continued on following page)

Section 244 of Article XVIII of the Rules of the Board of Regents, promulgated after the enactment of Section 3022 of the Education Law, provides that school authorities

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(Footnote continued from preceding page)

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purpose of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or ordr of ineligibility.

shall put into effect certain procedures for disqualification and removal of employees who violate Section 3021 of the Education Law or Section 105 of the Civil Service Law.

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3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.*

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.*

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members *and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof* who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political

(Footnote continued on following page)

Before appointment of an employee, the nominating official shall inquire of his former employers and of others whether he is known to have violated the statutory provisions, and no person found to have violated the statutes shall be eligible for employment. Each year school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership in an organization listed as subversive by the Board of Regents, indicating that the employee has violated the statutes. If there is

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(Footnote continued from preceding page)

subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Section 12-a of the Civil Service Law, referred to in Section 3022 of the Education Law, now appears as Section 105(1) and (2) of the Civil Service Law, N. Y. Sess. Laws 1958, ch. 790, § 105.

such evidence, the reporting official is to recommend the employee's dismissal, and within 90 days after the recommendation has been submitted, the school authorities must either prefer formal charges or reject the recommendation. If charges are preferred against persons serving on probation or having tenure, statutory dismissal procedures shall be followed. "In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings * * * as they deem the exigencies warrant, before taking final action on dismissal. In all cases, all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed."

The State University of New York at Buffalo, attempting to comply with the Regents' rules, distributed to all members of the academic staff a booklet containing the Regents' rules and the underlying statutes, and required each faculty member to sign a certificate (the "Feinberg certificate") declaring that he had read the Regents' rules; that the rules and the statutes cited therein constituted terms of his employment; and that he was not now a member of the Communist Party and if he ever had been, he had communicated that fact to the president of the university.

Four of the five plaintiffs in the present action—Keyishian, Hochfield, Garver, and Maud, all under term appointments to the academic staff of the University—declined to sign the certificates, and were notified that if they did not sign as requested their terms would not be renewed on grounds of insubordination. Keyishian's term has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions. They have been informed that dismissal proceedings will not be started against them until

the validity of the statutes, rules, and procedures is determined in the present suit. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university.

The fifth plaintiff, Starbuck, was appointed on September 1, 1963, to a one-year term as a specialist in acquisitions for the library. After starting work he was required to fill out a form, one question of which asked: "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the government of the United States or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means?" He refused to answer and was dismissed from his appointment on June 18, 1964.

On July 8, 1964, the plaintiffs brought a class action against a large part of the educational hierarchy of the State of New York, seeking an injunction against enforcement of the civil statutes concerning employment of subversives and of the regulations and procedures used to implement those statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three-judge district court. 233 F. Supp. 752 (W. D. N. Y., 1964.) The Court of Appeals for the Second Circuit reversed and directed that the case be heard before a three-judge court. 345 F. 2d 236 (2 Cir., 1965).

I. *The Constitutionality of the State's Objective.*

The plaintiffs argue in part that the complex of laws, regulations, and procedures under attack has no constitutionally valid objective—that they infringe upon freedom

of expression without being justified by any legitimate state interest.

The Supreme Court in the *Adler* case, considering statutes the predecessors of the ones now in question, described the importance of the state interest in preventing the use of the educational system as a platform for urging students to overthrow government by violent means:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

Adler v. *Board of Education*, 342 U. S. 485, 493 (1952).

The Supreme Court has not changed its recognition of the importance of this state interest in recent cases. In 1958, it quoted the above language from *Adler* with approval, in upholding the dismissal for "incompetency" of a Pennsylvania school teacher who refused to answer a question as to his activities in the Communist Party. *Beilan* v. *Board of Public Education*, 357 U. S. 399 (1958). In *Barenblatt* v. *United States*, 360 U. S. 109 (1959), the Court upheld the contempt conviction of a former teaching fellow at the University of Michigan, based on his refusal to answer questions of a congressional committee as to his past and present membership in the Communist party. The Court indicated that Congress had a legitimate interest in "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities * * * persons and groups committed to furthering the objective of overthrow." 360 U. S. at 129. In *Cramp* v. *Board of*

Public Instruction, 368 U. S. 278 (1961), the Court struck down as unconstitutionally vague a Florida statute requiring state employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party"; but the Court did not "question the power of a State to safeguard the public service from disloyalty." 368 U. S. at 288. Nor does the recent decision of *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), cast any doubt upon the power of a state to act to prevent the incitement of violent overthrow on university campuses.

The plaintiffs argue that the legitimate state objective recognized by the Court in *Adler* is not present here, since the teachers here hold positions at universities rather than at public schools. The argument appears to be based upon the comparative maturity of mind of the university student, which entitles him to the privilege of exposure to conflicting political philosophies. But as the American Association of University Professors wrote in their *amicus* brief in *Barenblatt, supra,* a case involving a university teacher, "The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger situation, within which the interest in national self-preservation * * * also prominently appear[s]." Brief, p. 24. It would not be constitutional to prevent the *teaching* of Communist philosophy at the university level; but it would be dangerously anomalous to proscribe the advocacy of violent overthrow of government in all parts of the United States, see *Dennis* v. *United States,* 341 U. S. 494 (1951), except in the breeding-grounds of the future leaders of the nation. The interest in national self-preservation—"the ultimate value of any society," *Dennis* at 509—applies to the university campus as well as to the rest of our society.

II. *The Constitutionality of the Means Used to Attain the State's Objective.*

The plaintiffs maintain that even if the statutes and regulations under attack assert a legitimate state objective, they do so in a manner which unduly restricts other interests protected by the Constitution. The plaintiffs invoke a variety of constitutional clauses in support of their position.

A. The Ex Post Facto Clause.

An *ex post facto* law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* v. *Missouri*, 71 U. S. 277, 325-26 (1867).

In the present case, the plaintiffs either have been dismissed or are threatened with dismissal for failure to answer questions put to them under procedures designed to implement § 3022 of the Education Law, which was made applicable to colleges in 1953. Before being dismissed or threatened with dismissal, the plaintiffs were repeatedly told the purpose of the questions, the statutory basis for the questions, and the possibility that dismissal proceedings would be started if they failed to answer the questions. The proscription of their conduct preceded the conduct itself, so that the *ex post facto* clause does not apply. See *Garner* v. *Board of Public Works*, 341 U. S. 716, 721 (1951), in which the Court rejected an argument that dismissal of municipal employees for failure to take an oath was *ex post facto* punishment, with the observation that the activity covered by the oath had been proscribed years before the employees were asked to take the oath.

B. The Bill of Attainder Clause.

"Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment of them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett,* 328 U. S. 303, 315-16 (1946). The plaintiffs contend that Section 3022 of the Education Law, coupled with the Regents' regulations under that section and Section 105(1)(c) of the Civil Service Law, constitute a bill of attainder, since these provisions single out as ineligible for employment in state schools members of the Communist Party of New York and of the Communist Party of the United States. A similar argument was made and rejected in the *Adler* case.

The plaintiffs put particular reliance on *United States* v. *Brown,* 381 U. S. 437 (1965), in which the Court held unconstitutional as a bill of attainder a statute making it criminal for anyone "who is or has been a member of the Communist Party" to serve as an officer of a labor union within five years of the termination of his membership in the Communist Party. However, the statute attacked in the *Brown* case differs fundamentally from the statutes and regulations challenged here in the nature of the part played by the legislature in determining the underlying facts from which adverse consequences would follow. Assuming without deciding that dismissal from state employment can constitute "punishment"—a question left open in *Garner,* 241 U. S. 716 at 721 (1951) and not touched upon in *Brown*—the bill of attainder clause only forbids "punishment" imposed by a legislature as a result of "trial by legislature." *Brown,* 381 U. S. at 442. It is the unfairness of trial by a large body "peculiarly susceptible to popular clamor," 1 Cooley, Constitutional Limitations,

536-37 (8th ed. 1927) that underlies the bill of attainder clause. The court in *Brown* faced a statute involving just such a "trial by legislature"—a statute which specified the Communist Party by name, and made it a crime—automatically and incontestably—for a Party member to hold union office.

In the present case, disqualification from employment in the state schools did not follow automatically from a legislative determination that the Communist Party was a bad organization. Section 3022 of the Education Law provided that the Board of Regents shall, after full notice and hearing, make a list of organizations which it finds advocate the doctrine that government should be overthrown by force, violence, or other unlawful means. It was only after extensive hearings that the Board of Regents lists two organizations under Section 3022; the Communist Party of New York and the Communist Party of the United States. These determinations were subject to judicial review under Article 78 of the Civil Practice Act, now Article 78 of the Civil Practice Law and Rules. *Thompson* v. *Wallin*, 301 N. Y. 476, 493, 95 N. E. 2d 806 (1950), *aff'd subnom. Adler* v. *Board of Education*, 342 U. S. 485 (1952).

Section 105(1)(c) of the Civil Service Law, which makes membership in either the Communist Party of New York or that of the United States "*prima facie* evidence" of disqualification for the state civil service, was based not on an original determination by the state legislature of the aims of the Communist Party, but upon the findings of the Board of Regents under Section 3022 of the Education Law. The preamble to the amendment incorporating the reference to the two parties makes clear that the purpose of the reference was to bring Section 105 into harmony with

the determinations of the Board of Regents under Section 3022. N. Y. Sess. Laws 1958, c. 503, § 1.[2]

Again unlike the statute struck down in *Brown*, Sections 105(1)(c) of the Civil Service Law and 3022 of the Education Law make membership in the Communist Party only *prima facie* evidence of disqualification" from state employment. The presumption is rebuttable; at a hearing, the employee "may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy." *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96

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[2] The text of the preamble is as follows:

"*Declaration of legislative intent.*

The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law [now Section 105 of the Civil Service Law] with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list

'organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law';

that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima face* evidence of disqualification for appointment or continued employment."

N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U. S. 485 (1952). As the New York Court of Appeals stated in *Thompson* v. *Wallin*:

> "The phrase '*prima facie* evidence of disqualification' * * * imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the *prima facie* evidence * * * Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence."

301 N. Y. 476 at 494, 95 N. E. 2d 806 at 814-15. See also *Hughes* v. *Board of Higher Education*, 309 N. Y. 319, 130 N. E. 2d 638 (1955).

The disqualification of a teacher under these laws, in short, is not the result of a "legislative trial". The legislature in the first instance—in enacting Section 3022 of the Education Law—did nothing more than, in the language of *Brown*, 381 U. S. at 450, "set forth a generally applicable rule" as to the characteristics of organizations, membership in which should be evidence of disqualification. The determination of what organizations possessed those characteristics was left to an administrative body, to be made after notice, hearing, and opportunity for judicial review. The case closely resembles *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961), in which the Court holding that the Subversive Activities Control Act of 1950 was not a bill of attainder, stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities," 367 U. S. at

84-85, and pointed out that the initial findings under the Act "must be made after full administrative hearing subject to judicial review * * *" *Id.* at 87.

If anything, the statutes now under attack are less like a bill of attainder than the act held constitutional in *Communist Party* v. *Subversive Activities Control Board,* since the New York statutes provide opportunity for hearing and judicial review not only for the organizations listed, but also for their members. In short, in terms of a recent analysis of the history and purpose of the bill of attainder clause, the New York legislature here laid down "rules of general applicability", leaving "the job of application to other tribunals." Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L. J. 330, 347, 350 (1962).

C. The Due Process Clause.

Plaintiffs' principal challenge to the New York statutes and procedures is based on the protection afforded to free speech by the First Amendment, applicable to the states under the Fourteenth Amendment. Plaintiffs maintain that the New York laws and procedures impinge upon the rights of freedom of speech, thought, and expression more than is necessary to protect the state from violent overthrow, both by being too broad and vague, and by imposing an unfair burden on those who may be adversely affected, requiring them to justify their conduct.

1. Procedural Due Process and Speiser v. *Randall.*

Plaintiffs' "burden of justification" argument rests in large part on *Speiser* v. *Randall,* 357 U. S. 513 (1958), in which the Court held to be against due process of California statute which required veterans to file oaths declaring that

they did not advocate the overthrow of government by force, violence, or other unlawful means, before they could receive a state tax exemption. The essence of the Court's opinion was that by putting the burden of taking the first step and of proving eligibility on the applicants, the statute made it more likely that the exemption would be denied in borderline cases, and therefore that "legitimate utterance will be penalized." 357 U. S. at 526. The Court distinguished the *Garner* and *Douds* cases, in which oaths were upheld as valid prerequisites to state employment and union office, by pointing out that those cases "concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety," *id.* at 527, and that in those cases persons by taking the oaths could retain their positions subject to further proceedings in which the government would have the burden of proof. The Court also distinguished the New York statutes upheld in *Adler*, on the grounds that under those statutes "public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence." 357 U. S. at 528 n.8.

Later decisions have made clear that *Speiser* does not create a rule of law that a potential suspect in an area concerning freedom of speech must never be called upon to justify his conduct. *E.g., Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960), upholding discharges of county employees based upon their refusal to answer questions concerning subversive activities put to them by a congressional subcommittee; *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961) and *In re Anastaplo*, 366 U. S. 82 (1961), holding that admission to a state bar could be denied on the basis of an applicant's refusal to answer questions concerning Com-

munist activities. Instead, *Speiser* holds that in a case concerning First Amendment freedoms, the burden of proof must rest upon the attacker as much as possible, consonant with the protection of the legitimate interest asserted by the attacker.

In the present case, the university requirement that all teachers sign "Feinberg certificates" may have raised problems under *Speiser,* although apparently the teachers could retain their positions by signing the certificates, subject only to further proceedings in which the state would bear the burden of proof. But the university has discontinued its reliance on the certificate procedure, as of June 10, 1965. The state now investigates prospective appointees by asking the candidate and others questions concerning his compliance with the laws. The candidate is given a chance to explain his doubts, not provided under the certificate procedure. Absolute refusal to answer is made grounds for refusal to appoint; but this seems reasonable, in light of the opportunity to explain. Persons employed before June 10, 1965, shall not be deemed disqualified "solely by reason of" their failure to sign the Feinberg certificate. The State thus would have the burden of showing violations of the statutes, following the statutory procedures for dismissal as to teachers with tenure.

Plaintiffs maintain that teachers serving on contract and without tenure are denied procedural due process, since they are guaranteed by the Regents' regulations only "such hearings * * * as [the school authorities] deem the exigencies warrant * * *" In particular, plaintiffs point to the dismissal of Starbuck as evidence that the state will not give an adequate hearing to teachers without tenure.

It appears that after Starbuck failed to answer the question about subversive activities on his employment form,

he was told that he must answer it yes or no, and could explain if he answered yes. He did not answer, and was dismissed. We understand the law of New York to be in accordance with the advice given to Starbuck by the university officials. Although a teacher without tenure, Starbuck would have had an opportunity to explain and a right to a full hearing on whether or not he had violated the substantive provisions of the law, if he had answered the question yes. *Hughes* v. *Board of Higher Education,* 309 N. Y. 319, 130 N. E. 2d 638 (1955); *Lederman* v. *Board of Education,* 276 App. Div. 527, 96 N. Y. S. 2d 466 (2d Dep't 1950), *aff'd sub nom. Thompson* v. *Wallin,* 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub. nom. Adler* v. *Board of Education,* 342 U. S. 485 (1952). In light of this opportunity for explanation and a hearing, Starbuck cannot complain of lack of procedural due process. His dismissal was for insubordination in refusing to answer a relevant inquiry, and the Constitution does not require any hearing on one's reasons for refusal to cooperate with a relevant inquiry. See *Nelson* v. *County of Los Angeles,* 362 U. S. 1 (1960); *Konigsberg* v. *State Bar,* 366 U. S. 36 (1961); and *In re Anastaplo,* 366 U. S. 82 (1961). *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) may be distinguished, since in that case the Court found no necessary connection between Slochower's refusal to answer questions concerning activities twelve years before, put to him not by a school board but by a congressional committee, and his unfitness for service in the New York schools. Here Starbuck refused to answer a question put to him by school authorities concerning whether or not he presently advocated the violent overthrow of government.

Plaintiffs also assert that the provisions of Section 3022 of the Education Law and Section 105(1) of the Civil Service Law which make membership in the Communist

Party *prima facie* evidence of disqualification for employment by the state are contrary to procedural due process. The same argument was before the Supreme Court in *Adler*, and the Court decisively rejected it:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has a full opportunity to rebut it * * *. Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

342 U. S. 485, 494-96 (1952).

In support of its position, the Court looked to the interpretation of the statute by the New York courts below. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin, supra*, 806, 815 (1950). The Courts of New York not having changed their interpretation of the presumption contained in these statutes, see *Hughes* v. *Board of Higher Education*, 309 N. Y. 319, 130 N. Y. 2d 638 (1955), there is no reason to hold the presumption violative of due process today.

2. "Vagueness"

The plaintiffs maintain that breadth of language renders the statutes under attack unconstitutional, because it tends

to deter legitimate expression as well as expression which the State is justified in regulating. It is, of course, true that strict standards of draftsmanship are to be applied to a statute having a potentially inhibiting effect on speech; "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California*, 361 U. S. 147, 151 (1959). However, we must examine the present statutory complex, as implemented by the Regents' regulations and as interpreted by the New York Courts, to see whether it has a tendency to deter legitimate discussion and activities as well as to carry out the permissible objective of preventnig the advocacy of violent overthrow of government.

Subsection 2 of Section 3022 of the Education Law provides that the Board of Regents shall list organizations found to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown * * * by force" or found to "advocate, advise, teach, or embrace the duty, necessity, or propriety of adopting any such doctrine * * *." Section 105(1) of the Civil Service Law lists three causes for ineligibility for employment in the state civil service; wilfully advocating, advising, or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine.

Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should "be overthrown * * * by force" is a

basis for adverse consequences under these sections. Not innocent membership in the Communist Party, in contrast to what could have been deterred by the oath struck down in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); only knowing membership in an organization advocating the violent overthrow of government is grounds for ineligibility for state employment. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U. S. 485 (1952); see also *Adler* v. *Wilson*, 282 App. Div. 418, 123 N. Y. S. 2d 655 (3d Dept. 1953).

Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the "duty, necessity, or propriety" of adopting the doctrine of violent overthrow, before he can be disqualified from state employment. Finally, the sections just described do not deter representing the Communist Party in a lawsuit, or defending the constitutional rights of the Communist Party in a newspaper article, or voting for a candidate also supported by the Communist Party—the legitimate activities which the Supreme Court feared might be deterred by the broad oaths struck down in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961) (state employees had to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party") and in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964) (state teachers had to swear, among other things, that they did not aid any person to aid in the commission of any act intended to alter the constitutional form of government by force or violence).

The Supreme Court in *Baggett* made clear that narrowly drawn statutes aimed wholly at the control of subversive

activities would be upheld as constitutional. The Court distinguished the broad oath before it in *Baggett* from the oath upheld in *Gerende* v. *Board of Supervisors*, 341 U. S. 56 (1951), on the grounds that the *Gerende* oath required a candidate for state office to swear only that he is not engaged "in one way or another in the attempt to overthrow the government by force or violence," and that he is not knowingly a member of an organization engaged in such an attempt. The sections of the New York statutes just analyzed proscribe no more than the oath upheld in *Gerende*, and seem less questionable even than *Gerende* since they place the burden of taking the first step and the burden of proof on the official challenging eligibility. The Supreme Court upheld these sections, 3022 of the Education Law and 105(1) and (2) of the Civil Service Law (the last two subsections then being known as 12(a) of the Civil Service Law), in *Adler* v. *Board of Education*, 342 U. S. 485 (1952), although the sections were attacked on grounds of vagueness at that time. We see no reason to change the result of that case.

The remaining sections of the statutes under attack seem at first glance more general. Section 3021 of the Education Law provides for the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" while employed in the school system. Section 105(3) of the Civil Service Law provides for the removal of civil servants from office for "treasonable or seditious" words or acts.

However, the 1958 amendments to section 105(3) greatly restricted the scope of that subsection. N. Y. Sess. Laws 1958, ch. 790, sec. 105. "Treasonable words or acts", for

the purpose of 105(3), now must come within the definition of "treason" in Section 2380 of the Penal Law:

> "1. Levying war against the people of the state within this state; or, 2. A combination of two or more persons by force to usurp the government of the state or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or, 3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed by the constitution of the United States, as giving to such enemies aid and comfort within the state or elsewhere."

We do not understand the plaintiffs to challenge this definition of treason on grounds of vagueness; it is as good as can be done, and resembles the definition used in Article III, section 3, of the Federal Constitution. Even the third clause of the New York definition is narrow, having been construed to apply only in wars against foreign enemies waged by the State of New York separately from the United States. *People* v. *Lynch*, 11 Johns, R. 549 (1814).

Similarly, "seditious acts and utterances", for the purpose of section 105(3), now must come within the definition of "criminal anarchy" in section 160 of the Penal Law:

> "the doctrine that organized government should be overthrown by force or violence or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."

This is a definition closely connected with the state's legitimate interest in self-preservation, and as such is within the realm of the constitutional under *Gerende, Cramp,* and *Baggett.* We note in passing that the 1958 amendment to section 105(3) refers to section 160 of the Penal Law, entitled "Criminal anarchy defined". The looser language of section 161 of the Penal Law, entitled "Advocacy of

criminal anarchy", is not now before us, although the plaintiffs seem to wish that it were.

The 1958 amendments of section 105(3) did not, by their terms, extend to the parallel language of section 3021. But the history of the two sections—born as successive sections of an act of 1917, N. Y. Sess. Laws 1917, ch. 416, secs. 2 and and 3—together with the identity of langauge in the two sections, indicates that the two must be construed *in pari materia*. The presumption that statutes "will be construed in such a way as to avoid the constitutional question presented". *Baggett* v. *Bullitt*, 377 U. S. 360, 375 (1964), reinforces us in the conclusion that the words "seditious or treasonable acts or words" in section 3021, like their identical twins in section 105(3), must be defined by reference to sections 2330 and 160 of the Penal Law. When this is done, sections 3021 and 105(3)—like the separable but related Section 3022 and 105(1) and (2)—become sharply defined, and can withstand any possible attack on grounds of vagueness.

III. Conclusion

We find constitutional section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents, and the procedures under these statutes and rules now in effect at the State University of New York at Buffalo. We accordingly give judgment for the defendants, and deny the plaintiffs all the relief requested by them.

/s/ LEONARD P. MOORE
U. S. C. J.

/s/ HAROLD P. BURKE
U. S. J. U. S. D. C.

/s/ JOHN O. HENDERSON
U. S. D. J.

January 5th, 1966.

Appendix B

ADLER *v.* BOARD OF EDUCATION.

Syllabus.

ADLER ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 8. Argued January 3, 1952.—Decided March 3, 1952.

The Civil Service Law of New York, § 12-a, makes ineligible for employment in any public school any member of any organization advocating the overthrow of the Government by force, violence or any unlawful means. Section 3022 of the Education Law, added by the Feinberg Law, requires the Board of Regents (1) to adopt and enforce rules for the removal of any employee who violates, or is ineligible under, § 12-a, (2) to promulgate a list of organizations described in § 12-a, and (3) to provide in its rules that membership in any organization so listed is *prima facie* evidence of disqualification for employment in the public schools. No organization may be so listed, and no person severed from or denied employment, except after a hearing and subject to judicial review. *Held:* This Court finds no constitutional infirmity in § 12-a of the Civil Service Law of New York or in § 3022 of the Education Law. Pp. 486-496.

1. Section 3022 and the rules promulgated thereunder do not constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of New York. *Garner* v. *Los Angeles Board,* 341 U. S. 716. Pp. 491-493.

2. The provisions of § 3022 directing the Board of Regents to provide in rules thereunder that member-

ship in any organization so listed by the Board shall constitute *prima facie* evidence of disqualification for employment in the public schools does not deny members of such organizations due process of law. Pp. 494-496.

3. The use of the word "subversive" in § 1 of the Feinberg Law, which is a preamble and not a definitive part of the Act, does not render the statute void for vagueness under the Due Process Clause, in view of the fact that in subdivision 2 of § 3022 it is given a very definite meaning—*i.e.*, an organization that advocates the overthrow of government by force or violence. P. 496.

4. The constitutionality of § 3021 of the Education Law not having been questioned in the proceedings in the lower courts and being raised here for the first time, it will not be passed upon by this Court before the state courts have had an opportunity to pass upon it. P. 496.

301 N. Y. 476, 95 N. E. 2d 806, affirmed.

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OCTOBER TERM, 1951.

Opinion of the Court.

In a declaratory judgment action, the Supreme Court of New York, Kings County, held that subdivision (c) of § 12-a of the New York Civil Service Law, § 3022 of the New York Education Law, and the rules of the State Board of Regents promulgated thereunder violated the Due Process Clause of the Fourteenth Amendment, and enjoined action thereunder by the Board of Education of New York City. 196 Misc. 873, 95 N. Y. S. 2d 114. The Appellate Division reversed. 276 App. Div. 527, 96 N. Y. S. 2d 466. The Court of Appeals of New York affirmed the decision of the Appellate Division. 301 N. Y.

476, 95 N. E. 2d 806. On appeal to this Court, *affirmed*, p. 496.

Osmond K. Fraenkel argued the cause for appellants. With him on the brief was *Arthur Garfield Hays*.

Michael A. Castaldi argued the cause for appellee. With him on the brief were *Denis M. Hurley, Seymour B. Quel, Daniel T. Scannell* and *Bernard Friedlander*.

By special leave of Court, *Wendell P. Brown*, Solicitor General, argued the cause for the State of New York, as *amicus curiae*, urging affirmance. With him on the brief were *Nathaniel L. Goldstein*, Attorney General, and *Ruth Kessler Toch*, Assistant Attorney General.

Dorothy Kenyon, Raymond L. Wise and *Herbert Monte Levy* filed a brief for the American Civil Liberties Union, as *amicus curiae*, supporting appellants.

Mr. Justice Minton delivered the opinion of the Court.

Appellants brought a declaratory judgment action in the Supreme Court of New York, Kings County, praying that § 12-a of the Civil Service Law,[1] as implemented by the so-called Feinberg Law,[2] be declared unconstitutional, and that action by the Board of Education of the City of New York thereunder be enjoined. On motion for judgment on the pleadings, the Court held that subdivision (c) of § 12-a, the Feinberg Law, and the Rules of the State Board of Regents promulgated thereunder violated the Due Process Clause of the Fourteenth Amendment, and issued an injunction. 196 Misc. 873, 85 N. Y. S. 2d 114. The Appellate Division of the Supreme Court reversed, 276 App. Div. 527, 96 N. Y. S. 2d 466, and the Court of Appeals affirmed the judgment of the Appellate Division,

[1] N. Y. Laws 1939, c. 547, as amended N. Y. Laws 1940, c. 564.

[2] N. Y. Laws 1949, c. 360.

301 N. Y. 476, 95 N. E. 2d 806. The appellants come here by appeal under 28 U. S. C. § 1257.

Section 12-a of the Civil Service Law, hereafter referred to as § 12-a, is set forth in the margin.[3] To implement this law, the Feinberg Law was passed, adding a new

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[3] "§ 12-a. *Ineligibility*

"No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

section, § 3022, to the Educational Law of the State of New York, which section so far as here pertinent is set forth in the margin.[4] The Feinberg Law was also to implement § 3021 of the Educational Law of New York.[5] The consti-

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[4] "§ 3022. *Elimination of subversive persons from the public school system*

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointments to or retention in any office or position in the public schools of the state."

[5] "§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances*

"A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

tutionality of this section was not attacked in the proceedings below.

The preamble of the Feinberg Law, §1, makes elaborate findings that members of subversive groups, particularly of the Communist Party and its affiliated organizations, have been infiltrating into public employment in the public schools of the State; that this has occurred and continues notwithstanding the existence of protective statutes designed to prevent the appointment to or retention in employment in public office, and particularly in the public schools, of members of any organizations which teach or advocate that the government of the United States or of any state or political subdivision thereof shall be overthrown by force or violence or by any other unlawful means. As a result, propaganda can be disseminated among the children by those who teach them and to whom they look for guidance, authority, and leadership. The Legislature further found that the members of such groups use their positions to advocate and teach their doctrines, and are frequently bound by oath, agreement, pledge, or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. This propaganda, the Legislature declared, is sufficiently subtle to escape detection in the classroom; thus, the menace of such infiltration into the classroom is difficult to measure. Finally, to protect the children from such influence, it was thought essential that the laws prohibiting members of such groups, such as the Communist Party or its affiliated organizations, from obtaining or retaining employment in the public schools be rigorously enforced. It is the purpose of the Feinberg Law to provide for the disqualification and removal of superintendents of schools, teachers, and employees in the public schools in any city or school district of the State who advocate the

overthrow of the Government by unlawful means or who are members of organizations which have a like purpose.

Section 3022 of the Education Law, added by the Feinberg Law, provides that the Board of Regents, which has charge of the public school system in the State of New York, shall, after full notice and hearing, make a listing of organizations which it finds advocate, advise, teach, or embrace the doctrine that the government should be overthrown by force or violence or any other unlawful means, and that such listing may be amended and revised from time to time.

It will be observed that the listings are made only after full notice and hearing. In addition, the Court of Appeals construed the statute in conjunction with Article 78 of the New York Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6B, so as to provide listed organizations a right of review.

The Board of Regents is further authorized to provide in rules and regulations, and has so provided, that membership in any listed organization, after notice and hearing, "shall constitute *prima facie* evidence for disqualification for appointment to or retention in any office or position in the school system";[6] but before one who is an employee

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[6] "§ 254. *Disqualification or removal of superintendents, teachers and other employes.*

* * *

"2. *List of subversive organizations to be issued.* Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or em-

(Footnote continued on following page)

or seeks employment is severed from or denied employment, he likewise must be given a full hearing with the privilege of being represented by counsel and the right to judicial review.[7] It is § 12-a of the Civil Service Law, as implemented by the Feinberg Law as above indicated, that is under attack here.

It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds,* 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell,* 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose

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(Footnote continued from preceding page)

brace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Supp.), Vol. 1, pp. 205-206.

[7] The Court of Appeals construed the statute in conjunction with § 12-a subd. [d], *supra,* n. 3. The Rules of the Board of Regents provided: "In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed." Section 254, 1 (e), Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Supp.), Vol. 1, p. 206.

to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.

The constitutionality of the first proposition is not questioned here. *Gitlow* v. *New York,* 268 U. S. 652, 667-672, construing § 161 of the New York Penal Law.

As to the second, it is rather subtly suggested that we should not follow our recent decision in *Garner* v. *Los Angeles Board,* 341 U. S. 716. We there said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." 341 U. S., at p. 720.

We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and

employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

It is next argued by appellants that the provision in § 3022 directing the Board of Regents to provide in rules and regulations that membership in any organization listed by the Board after notice and hearing, with provision for review in accordance with the statute, shall constitute *prima facie* evidence of disqualification, denies due process, because the fact found bears no relation to the fact presumed. In other words, from the fact found that the organization was one that advocated the overthrow of govern-

ment by unlawful means and that the person employed or to be employed was a member of the organization and knew of its purpose,[8] to presume that such member is disqualified for employment is so unreasonable as to be a denial of due process of law. We do not agree.

> "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. * * *
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> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous." *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, at p. 42.

Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that "generality of experience" points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard:

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[8] In the proceedings below, both the Appellate Division of the Supreme Court and the Court of Appeals construed the statute to require such knowledge. 276 App. Div. 527, 530, 96 N. Y. S. 2d 466,

"The statute also makes it clear that * * * proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): 'The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it.' Thus, the phrase '*prima facie* evidence of disqualification,' as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process." 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, at 814-815.

Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied.

Without raising in the complaint or in the proceedings in the lower courts the question of the constitutionality of § 3021 of the Education Law of New York, appellants urge here for the first time that this section is unconstitutionally vague. The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so. *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213-216; *Alabama*

State Federation of Labor v. *McAdory,* 325 U. S. 450, 460-462; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546.

It is also suggested that the use of the word "subversive" is vague and indefinite. But the word is first used in § 1 of the Feinberg Law, which is the preamble to the Act, and not in a definitive part thereof. When used in subdivision 2 of § 3022, the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence.

We find no constitutional infirmity in § 12-a of the Civil Service Law of New York or in the Feinberg Law which implemented it, and the judgment is

Affirmed.

MR. JUSTICE BLACK, dissenting.

While I fully agree with the dissent of MR. JUSTICE DOUGLAS, the importance of this holding prompts me to add these thoughts.

This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for school teachers—to think or say anything except what a transient majority happen to approve at the moment. Basically these laws rest on the belief that government should supervise and limit the flow of ideas into the minds of men. The tendency of such governmental policy is to mould people into a common intellectual pattern. Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free. Such a governmental policy encourages varied intellectual outlooks in the belief that the best views will prevail. This policy of freedom is in my judgment embodied in the First Amendment and made applicable to the states by the Fourteenth. Because of this policy public officials

cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with. Public officials with such powers are not public servants; they are public masters.

I dissent from the Court's judgment sustaining this law which effectively penalizes school teachers for their thoughts and their associates.

MR. JUSTICE FRANKFURTER, dissenting.

We are asked to pass on a scheme to counteract what are currently called "subversive" influences in the public school system of New York. The scheme is formulated partly in statutes and partly in administrative regulations, but all of it is still an unfinished blueprint. We are asked to adjudicate claims against its constitutionality before the scheme has been put into operation, before the limits that it imposes upon free inquiry and association, the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it. In accordance with the settled limits upon our jurisdiction I would dismiss this appeal.

An understanding of the statutory scheme and the action thus far taken under it is necessary to a proper consideration of the issues which for me control disposition of the case, namely, standing of the parties and ripeness of the constitutional question.

A New York enactment of 1949 precipitated this litigation. But that legislation is tied to prior statutes. By a law of 1917 "treasonable or seditious" utterances or acts barred employment in the public schools. New York Education Law, § 3021. In 1939 a further enactment disqualified from the civil service and the educational system anyone who advocates the overthrow of government by force, violence or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society advocating such doctrine. New York Civil Service Law, § 12-a. This states with sufficient accuracy the provisions of this Law, which also included detailed provisions for the hearing and review of charges.

During the thirty-two years and ten years, respectively, that these laws have stood on the books, no proceedings, so far as appears, have been taken under them. In 1949 the Legislature passed a new act, familarly known as the Feinberg Law, designed to reinforce the prior legislation. The Law begins with a legislative finding, based on "common report" of widespread infiltration by "members of subversive groups, and particularly of the communist party and certain of its affiliated organizations," into the educational system of the State and the evils attendant upon that infiltration. It takes note of existing laws and exhorts the authorities to greater endeavor of enforcement. The State Board of Regents, in which are lodged extensive powers over New York educational system, was charged by the Feinberg Law with these duties:

(1) to promulgate rules and regulations for the more stringent enforcement of existing law;

(2) to list "after inquiry, and after such notice and hearing as may be appropriate" those organizations membership in which is proscribed by subsection (c) of § 12-a of the Civil Service law;

(3) to provide in its rules and regulations that membership in a listed organization shall be *prima facie* evidence of disqualification under § 12-a;

(4) to report specially and in detail to the legislature each year on measures taken for the enforcement of these laws.

Accordingly, the Board of Regents adopted Rules for ferreting out violations of § 3021 or § 12-a. An elaborate machinery was designed for annual reports on each employee with a view to discovering evidence of violations of these sections and to assuring appropriate action on such discovery. The Board also announced its intention to publish the required list of proscribed organizations and defined the significance of an employee's membership therein in proceedings for his dismissal. These Rules by the Board of Regents were published with an accompanying Memorandum by the Commissioner of Education. He is the administrative head of New York's school system and his Memorandum was for the guidance of school officials throughout the State. It warned of the danger of indiscriminate or careless action under the Feinberg Law and the Regents' Rules, and laid down this duty:

> "The statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case."

The Rules and Memorandum appear in the record; we shall have occasion to refer later to their relevance to what was decided below. Our attention has also been called to an order of the Board of Education of the City of New York, the present appellee. This order further elaborates

the part of the Regents' Rules dealing with reports on teachers. It is not clear whether this order has gone into effect. In any event it was not before the lower courts and is not in the record here.

It thus appears that we are asked to review a complicated statutory scheme prohibiting those who engage in the kind of speech or conduct that is proscribed from holding positions in the public school system. The scheme is aligned with a complex system of enforcement by administrative investigation, reporting and listing of proscribed organizations. All this must further be related to the general procedures under the New York law for hearing and reviewing charges of misconduct against educational employees, modified as those procedures may be by the Feinberg Law and the Regents' Rules.

This intricate machinery has not yet been set in motion. Enforcement has been in abeyance since the present suit, among others, was brought to enjoin the Board of Education from taking steps or spending funds under the statutes and Rules on the theory that these transgressed various limitations which the United States Constitution places on the power of the States. The case comes here on the bare bones of the Feinberg Law only partly given flesh by the Regents' Rules. It was decided wholly on pleadings: a complaint, identifying the plaintiffs and their interests, setting out the offending statutes and Rules, and concluding in a more or less argumentative fashion that these provisions violate numerous constitutional rights of the various plaintiffs; an answer, denying that the impact of the statute is unconstitutional and that the plaintiffs have any interest to support the suit. On these pleadings summary judgment in favor of some of the plaintiffs was granted by the Supreme Court in Kings County, 196 Misc.

873, 95 N. Y. S. 2d 114; this was reversed by the Appellate Division for the Second Department with direction that the complaint be dismissed, 276 App. Div. 527, 96 N. Y. S. 2d 466, and the Court of Appeals affirmed the Appellate Division. 301 N. Y. 476, 95 N. E. 2d 806. These pleadings and the opinions below are the basis on which we are asked to decide this case.

About forty plaintiffs brought the action initially; the trial court dismissed as to all but eight. 196 Misc., at 877, 95 N. Y. S. 2d, at 117-118. The others were found without standing to sue under New York law. The eight who are here as appellants alleged that they were municipal taxpayers and were empowered, by virtue of N. Y. Gen. Municipal Law § 51, to bring suit against municipal agencies to enjoin waste of funds. New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance of one whose interest has no material significance and is undifferentiated from the mass of his fellow citizens. *Doremus* v. *Board of Education*, 342 U. S. 429. This is not a "pocketbook action." As taxpayers these plaintiffs cannot possibly be affected one way or the other by any disposition of this case, and they make no such claim. It may well be that the authorities will, if left free, divert funds and effort from other purposes for the enforcement of the provisions under review, though how much leads to the merest conjecture. But the total expenditure, certainly the new expenditure, necessary to implement the Act and Rules may well be *de minimis*. The plaintiffs at any rate have not attempted to show that any such expenditure would come from funds

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to which their taxes contribute. In short, they have neither alleged nor shown that our decision on the issues they tender would have the slightest effect on their tax bills or even on the aggregate bill of all the City's taxpayers whom they claim to represent. The high improbability of being able to make such a demonstration, in the circumstances of this case, does not dispense with the requirements for our jurisdiction. If the incidence of taxation in a city like New York bears no relation to the factors here under consideration, that is precisely why these taxpayers have no claim on our jurisdiction.

This ends the matter for plaintiffs Krieger and Newman. But six of the plaintiffs advanced grounds other than that of being taxpayers in bringing this action. Two are parents of children in New York City schools. Four are teachers in these schools. On the basis of the record before us these claims, too, are insufficient, in view of our controlling adjudications, to support the jurisdiction of this Court.

The trial court found the interests of the plaintiffs as parents inconsequential. 196 Misc., at 875, 95 N. Y. S. 2d, at 816. I agree. Parents may dislike to have children educated in a school system where teachers feel restrained by unconstitutional limitations on their freedom. But it is like catching butterflies without a net to try to find a legal interest, indispensable for our jurisdiction, in a parent's desire to have his child educated in schools free from such restrictions. The hurt to parents' sensibilities is too tenuous or the inroad upon rightful claims to public education too argumentative to serve as the earthy stuff required for a legal right judicially enforceable. The claim does not approach an immediacy or directness or solidity that which our whole process of constitutional adjudication has deemed a necessary condition to the Court's settlement of constitutional issues.

An apt contrast is provided by *McCollum* v. *Board of Education*, 333 U. S. 203, where a parent did present an individualized claim of his own that was direct and palpable. There the parent alleged that Illinois imposed restrictions on the child's free exercise of faith and thereby on the parent's. The basis of jurisdiction in the *McCollum* case was not at all a parental right to challenge in the courts—or at least in this Court—educational provisions in general. The closely defined encroachment of the particular arrangement on a constitutionally protected right of the child, and of the parent's right in the child, furnished the basis for our review. The Feinberg Law puts no limits on any definable legal interest of the child or of its parents.

This leaves only the teachers, Adler, Spencer, and George and Mark Friedlander. The question whether their interest as teachers was sufficient to give them standing to sue was thought by the trial court to be conclusively settled by our decision in *United Public Workers* v. *Mitchell*, 330 U. S. 75. I see no escape from the controlling relevance of the *Mitchell* case. There individual government employees sought to enjoin enforcement of the provisions of the Hatch Act forbidding government employees to take active part in politics. The complaint contained detailed recitals of the desire, intent and specific steps short of violation on the part of plaintiffs to engage in the prohibited activities. See *id.*, at 87-88, n. 18. There as here the law was attacked as violating constitutional guaranties of freedom of speech. We found jurisdiction wanting to decide the issue except as to one plaintiff whose conduct had already violated the applicable standards.

The allegations in the present action fall short of those found insufficient in the *Mitchell* case. These teachers do not allege that they have engaged in proscribed conduct

or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations for fear of the Feinberg Law's interdict, except to say generally that the system complained of will have this effect on teachers as a group. They do not assert that they are threatened with action under the law, or that steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law. They merely allege that the statutes and Rules permit such action against some teachers. Since we rightly refused in the *Mitchell* case to hear government employees whose conduct was much more intimately affected by the law there attacked than are the claims of plaintiffs here, this suit is wanting in the necessary basis for our review.

This case proves anew the wisdom of rigorous adherence to the prerequisites for pronouncement by this Court on matters of constitutional law. The absence in these plaintiffs of the immediacy and solidity of interest necessary to support jurisdiction is reflected in the atmosphere of abstraction and ambiguity in which the constitutional issues are presented. The broad, generalized claims urged at the bar touch the deepest interests of a democratic society: its right to self-preservation and ample scope for the individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests. The judicial role in this process of accommodation is necessarily very limited and must be carefully circumscribed. To that end the Court, in its long history, has developed "a series of rules" carefully formulated by Mr. Justice Brandeis, "under which it has avoided passing upon a large

part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346.

We have emphasized that, as to the kind of constitutional questions raised by the Feinberg Law, "the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by [the State] comports with the dictates of the Constitution." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 409. But as the case comes to us we can have no guide other than our own notions—however uncritically extra-judicial—of the real bearing of the New York arrangement on the freedom of thought and activity, and especially on the feeling of such freedom, which are, as I suppose no one would deny, part of the necessary professional equipment of teachers in a free society. The scheme for protecting the school system from being made the instrument of purposes other than a school system should serve in a free society—certainly a concern within the constitutional powers of a State—bristles with ambiguities which must enter into any constitutional decision we may make. Of these only a few have been considered by the courts below. We are told that an organization cannot be listed by the Regents except after hearing. 301 N. Y., at 488, 493, 494, 95 N. E. 2d, at 810-811, 814-815. From this it may be assumed that the hearing contemplated is that found wanting by some members of this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The effect of the requirement that membership in a listed organization be *prima facie* evidence of disqualification in a dismissal proceeding is enlarged upon. 301 N. Y., at 494, 95 N. E. 2d, at 814-8-5. And the Court

of Appeals indicates that only one who "knowingly holds membership in an organization named upon any listing" is subjected to the operation of that rebuttable presumption. *Id.*, at 494, 95 N. E. 2d, at 814.

These are the only islands of clarity. Otherwise we are at sea. We are not told the meaning to be attributed to the words "treasonable or seditious" in § 3021 of the Education Law, though that is one of the two sections of preexisting law which the elaborate apparatus of the Feinberg Law is designed to enforce. In light of the experience under the Sedition Act of 1798, 1 Stat. 596, "seditious" can hardly be deemed a self-defining term or a word of art. See Miller, Crisis in Freedom, 136-137. Nor can we turn to practical application or judicial construction for sufficient particularity of the meaning to be attributed to the range of activity proscribed by § 12-a. Concern over the latitude afforded by such phrases as "the overthrow of government by * * * any unlawful means" when positions of trust or public employment are conditioned upon disbelief in such an objective cannot be deemed without warrant. See *American Communications Assn.* v. *Douds*, 339 U. S. 382, 415, 435; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 724. In those cases the Court had ground for limiting the reach of a dubious formula. No such alternative is available here.

These gaps in our understanding of the precise scope of the statutory provisions are deepened by equal uncertainties in the implementing Rules. Indeed, according to the Appellate Division these Rules are not in the case. 276 App. Div., at 531, 96 N. Y. S. 2d, at 471. And the Court of Appeals was silent on the point. Therefore we are without enlightenment, for example, on the nature of the reporting system described by the Rules. This may be a vital

matter, affecting not the special circumstances of a particular case but coloring the whole scheme. For it may well be of constitutional significance whether the reporting system contemplates merely the notation as to each teacher that no evidence of disqualification has turned up, if such be the case, or whether it demands systematic and continuous surveillance and investigation of evidence. The difference cannot be meaningless, it may even be decisive, if our function is to balance the restrictions on freedom of utterance and of association against the evil to be suppressed. Again, the Rules seem to indicate that past activities of the proscribed organizations or past membership in listed organizations may be enough to bar new applicants for employment. But we do not know, nor can we determine it. This, too, may make a difference. See *Garner* v. *Board of Public Works of Los Angeles, supra,* at 729 (MR. JUSTICE BURTON dissenting in part). We do not know, nor can we ascertain, the effect of the presumption of continuing membership in proscribed organizations that is drawn from evidence of past membership "in the absence of a showing that such membership has been terminated in good faith." We are uninformed of the effect in law of the Commissioner's memorandum, and there is no basis on which to appraise its effect in practice. As for the order of the Board of Education of the City of New York, it is not even formally in the case. In the face of such uncertainties this Court has in the past found jurisdiction wanting, howsoever much the litigants were eager for constitutional pronouncements. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Congress of Industrial Organizations* v. *McAdory,* 325 U. S. 472; *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Parker* v. *County of Los Angeles,* 338 U. S. 327.

This statement of reasons for declining jurisdiction sounds technical, perhaps, but the principles concerned are not so. Rare departures from them are regrettable chapters in the Court's history, and in well-known instances they caused great public misfortune.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights.[9] I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

The public school is in most respects the cradle of our democracy. The increasing role of the public school is seized upon by proponents of the type of legislation represented by New York's Feinberg law as proof of the importance and need for keeping the school free of "subversive influences." But that is to misconceive the effect of this type of legislation. Indeed the impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship.

The present law proceeds on a principle repugnant to our society—guilt by association. A teacher is disqualified because of her membership in an organization found to be

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[9] *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716.

"subversive." The finding as to the "subversive" character of the organization is made in a proceeding to which the teacher is not a party and in which it is not clear that she may even be heard. To be sure, she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the "subversive" character of the organization apparently may not be reopened in order to allow her to show the truth of the matter. The irrebuttable charge that the organization is "subversive" therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a *prima facie* case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed.

The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program becomes suspect. These are the organizations into which Communists often infiltrate. Their presence infects the whole, even though the project was not conceived in sin. A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.

But that is only part of it. Once a teacher's connection with a listed organization is shown, her views become subject to scrutiny to determine whether her membership in the organization is innocent or, if she was formerly a

member, whether she has *bona fide* abandoned her membership.

The law inevitably turns the school system into a spying project. Regular loyalty reports on the teachers must be made out. The principals become detectives; the students, the parents, the community become informers. Ears are cocked for tell-tale signs of disloyalty. The prejudices of the community come into play in searching out the disloyal. This is not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances.

What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the Grapes of Wrath? What was behind the praise of Soviet progress in metallurgy in the chemistry class? Was it not "subversive" for the teacher to cast doubt on the wisdom of the venture in Korea?

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take he place of inquiry. A "party line"—as dangerous as the "party line" of the Communists lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its

edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

This, I think, is what happens when a censor looks over a teacher's shoulder. This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life. We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law.

Of course the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school systems meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.

ROBERT THOMPSON, as Chairman of the Communist Party of the State of New York, et al., Appellants, *v.* WILLIAM J. WALLIN et al., Constituting the Board of Regents of the University of the State of New York, Respondents.

In the Matter of CHARLES L'HOMMEDIEU et al., Appellants, against BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK et al., Respondents.

ABRAHAM LEDERMAN, as President of Teachers Union of the City of New York, Local 555 of the United Public Workers, et al., Plaintiffs, and IRVING ADLER et al., Appellants, *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent.

Argued October 11, 1950; decided November 30, 1950.

Constitutional Law—public schools—teachers and other school employees—subversive activities—(1) after enacting section 3021 of Education Law directing removal of public school teachers for seditious acts or utterances, section 12-a was added to Civil Service Law disqualifying from positions in public schools any who taught overthrow of Government by force; later by section 1 of chapter 360 of Laws of 1949, Legislature found that members of subversive groups and particularly of "communist party" had infiltrated into public schools despite statutes to prevent same and had used their positions to teach subversive doctrines; section 3022 (Feinberg Law), added to Education Law by chapter 360, provides for disqualification by Board of Regents of public school employees who violate section 3021 of Education Law or are ineligible under section 12-a of Civil Service Law; subdivision 2 of statute directs Board of Regents to list subversive organizations and states that membership in any such constitutes "prima facie evidence of disqualification" for such positions; statute

constitutional—(2) said law implements section 12-a of Civil Service Law and provides basis of disqualification for employment in public education, constitutional function of State; restrictive provisions of statute bear reasonable relation to purpose of safeguarding public schools—(3) constitutional rights to freedom of speech and press not absolute and do not deprive State of primary right of self-preservation; in view of declaration of findings by Legislature in preamble, statute not unreasonable or arbitrary exercise of police power nor does it unwarrantably infringe constitutional rights of free speech and assembly —(4) statute has no legal characteristics of bill of attainder despite motion of "communist party" as subversive in preamble thereto since preamble enacts nothing—(5) no lack of clarity in subdivision 2 directing listing of subversive organizations as set forth in section 12-a of Civil Service Law—(6) while membership in such organization deemed prima facie evidence of disqualification for employment, presumption disappears on offer of substantial evidence to contrary; no question of procedural due process —(7) no restriction in statute exceeding Legislature's constitutional power.

1. In 1917 the Legislature added to the Education Law present section 3021 directing the removal of superintendents, teachers and employees in the public schools for treasonable or seditious acts or utterances. In 1939 there was added to the Civil Service Law section 12-a which provided, *inter alia,* that no one should be appointed to or continued as superintendent or teacher in a public school who advocated or taught that the Government of the United States or of any State or political subdivision should be overthrown by force or who organized or became a member of any society or group teaching such doctrine. One

so dismissed or declared ineligible was entitled to a hearing on such charges and the burden of sustaining the order by a fair preponderance of credible evidence was on the person making the order. Ten years later by section 1 of chapter 360 of the Laws of 1949, the Legislature found that members of subversive groups and "particularly of the communist party" had infiltrated into the public schools despite the statutes designed to prevent such action and that members of such groups advocating violent overthrow of the Government used their position to advocate and teach subversive doctrines and, further, that to avert such infiltration the Board or Regents should be directed to meet the menace by affirmative action. To meet such conditions section 3022 (known as the Feinberg Law) was enacted by said chapter. It provides that the Board of Regents shall adopt and enforce rules and regulations for the disqualification of superintendents, teachers or employees in the public schools who violate the provisions of section 3021 of the Education Law or who are ineligible on any of the grounds set forth in section 12-a of the Civil Service Law. Subdivision 2 directs the Board of Regents to list the organizations which it finds to be subversive for teaching the violent overthrow of Government and provides that it may utilize similar listings promulgated by any Federal agency and that it shall provide that membership in any such organization shall constitute prima facie evidence of disqualification for appointment to or retention in any position in the public schools. Judgments and orders upholding the constitutionality of said section should be affirmed.

2. The Feinberg Law serves to implement section 12-a of the Civil Service Law in manner found by the Legislature to be expedient in view of the circumstances set forth in its preamble. It provides a basis of disqualification for

employment by State or municipal agencies of personnel essential to a constitutional function of the State, the education of its children. The judgment of the Legislature as expressed in the restrictive provisions of the statute bears a reasonable relation to the legislative purpose to safeguard the public school system.

3. The freedoms of speech and press guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution are not absolute and do not deprive the State of its primary right of self-preservation. Those freedoms do not sanction unbridled license. By enacting the Feinberg Law, the Legislature—acting within its province—has found and has declared that conditions—referred to in the preamble—did exist and required the adoption of statutory measures to protect public school children from subversive influences. Whether the danger envisaged was "clear and present" is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools has occurred and that the consequence thereof is that subversive propaganda can be disseminated among children of tender years and that members of such groups use their office to teach such doctrines. The Feinberg Law is neither an unreasonable or arbitrary exercise of the police power nor does it unwarrantably infringe upon any constitutional right of free speech, assembly or association.

4. It is contended that the statute is a bill of attainder violative of section 9 of article I of the Federal Constitution, in that its preamble states that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools. The preamble, however, enacts nothing, contains no direc-

tive and, indeed, was not made part of the Education Law. Provision is made for a hearing to be afforded any organization as to which an inquiry shall be instituted and no punishment is inflicted on any organization which, after hearing, the board shall find advocates the overthrow of Government by force or unlawful means. Any organization aggrieved by the board may, under the statute, bring a proceeding under article 78 of the Civil Practice Act.

5. There is no lack of clarity in the operative clause of subdivision 2 of said section 3022 which directs the board to list organizations found to be subversive for teaching the overthrow of Government by force.

6. Under subsdivision 2 no organization may be listed as subversive until after inquiry and appropriated hearing. While knowingly holding membership in such an organization shall constitute "prima facie evidence of disqualification" for tion disappears and thus the quoted phrase imports a hearing at which one who seeks appointment or retention is afforded an opportunity to present such evidence. Once such contrary evidence has been received, the official who made the order has the burden of sustaining the validity thereof and provisions for review are prescribed by section 12-a of the Civil Service Law. Consequently, there is no question of procedural due process.

7. There is no restriction in the statute which exceeds the Legislature's constitutional power.

Thompson v. *Wallin*, 276 App. Div. 463, affirmed.

Matter of L'Hommedieu v. *Board of Regents of Univ. of State of N. Y.*, 276 App. Div. 494, affirmed.

Lederman v. *Board of Educ. of City of N. Y.*, 276 App. Div. 527, affirmed.

APPEAL, in the first above entitled action, from a judgment in favor of defendants, entered March 15, 1950, upon an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Albany County upon an order of the Court at Special Term (SHIRICK, J.; opinion 196 Misc. 686), granting judgment on the pleadings in favor of plaintiffs declaring unconstitutional chapter 360 of the Laws of 1949. The Appellate Division also declared said statute to be constitutional in all respects, and directed a dismissal of the complaint.

APPEAL, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1950, which reversed, on the law, an order of the Supreme Court at Special Term (SHIRICK, J.; opinion 196 Misc. 686), entered in Albany County, in a proceeding under article 78 of the Civil Practice Act granting a motion by petitioners for an order directing respondents, constituting the Board of Regents and others, from taking any action pursuant to chapter 360 of the Laws of 1949 and declaring said statute to be unconstitutional. The order of the Appellate Division appealed from directed a dismissal of the petition.

APPEAL, in the third above-entitled action, from a judgment in favor of defendant entered April 5, 1950, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs-appellants, entered in Kings County upon an order of the court at Special Term (HEARN, J.; opinion 196 Misc. 873) granting a motion by said plaintiffs for judgment on the pleadings under rule 112 of the Rules of Civil Practice (1)

declaring unconstitutional subdivision (c) of section 12-a of the Civil Service Law as implemented by chapter 360 of the Laws of 1949, and subdivision 2 of section 3022 of the Education Law, and section 254 of chapter XV-B of the Rules of the Board of Regents, and (2) restrained respondent board from enforcing said statutes and rule. The Appellate Division denied plaintiffs' motion for judgment on the pleadings and dismissed the complaint.

Abraham Unger, Osmond K. Fraenkel, David M. Freedman and *Bernard Jaffe* for appellants in first above-entitled action. I. Chapter 360 of the Laws of 1949 is a bill of attainder, in violation of the Constitution of the United States (art. I, § 10). (*United States* v. *Lovett,* 328 U. S. 303; *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Cummings* v. *Missouri,* 4 Wall. [U. S.] 277.) II. The Legislature has no constitutional right and lacks the legislative power to judge the doctrines of the Communist party or other organizations, to direct the Board of Regents to place them upon a subsersive list based upon its judgment of their doctrine, and to disqualify their members as public school teachers because of that doctrine (U. S. Const., 14th, 1st, 9th Amendts.; N. Y. Const., art. I, §§ 8, 9). (*Martin* v. *Hunter's Lessee,* 1 Wheat. [U. S.] 304; *M'Culloch* v. *Maryland,* 4 Wheat. [U. S.] 316; *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624; *United States* v. *Dennis,* 183 F. 2d 201; *Whitney* v. *California,* 274 U. S. 357; *Matter of Bridgman* v. *Kern,* 257 App. Div. 420; *Ex parte Milligan,* 4 Wall. [U. S.] 2; *De Jonge* v. *Oregon,* 299 U. S. 353.)

Frederic A. Johnson, Osmond K. Fraenkel, Fred G. Moritt and *Morris Eisenstein* for appellants in second above-entitled proceeding. The Feinberg Law rests judicial power over civil rights in an administrative body contrary

to the constitutional guarantees of due process and of equal protection of the laws, it is an *ex post facto* law; and, a bill of attainder. (*Whitney* v. *California*, 274 U. S. 357; *Palko* v. *Connecticut*, 302 U. S. 319; *Staten Is. Edison Corp.* v. *Maltbie*, 296 N. Y. 374; *Matter of Tompkins* v. *Board of Regents of Univ. of State of N. Y.*, 299 N. Y. 469; *Matter of Friedel* v. *Board of Regents of Univ. of State of N. Y.*, 296 N. Y. 347; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Kring* v. *Missouri*, 107 U. S. 221.)

Nathaniel L. Goldstein, Attorney-General (*Wendell P. Brown* and *Ruth Kessler Toch* of counsel), for respondents in first above-entitled action and second above-entitled proceeding. I. The standards for qualification as teachers in the public schools of this State are statutory, fixed by the Legislature which may, constitutionally, require as qualification, and declare as disqualification, factors other than scholastic, including, as a qualification, adherence to the form of Government of the United States, and as a disqualification, advocacy of the overthrow of the Government by force, violence or other unlawful means. (*Hawker* v. *New York*, 170 U. S. 189; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *United States* v. *Dennis*, 183 F. 2d 201; *People* v. *Crane*, 214 N. Y. 154, 239 U. S. 195; *Heim* v. *McCall*, 214 N. Y. 629, 239 U. S. 175; *Friedman* v. *Schwellenbach*, 159 F. 2d 22; *Washington* v. *Clark*, 84 F. Supp. 964; *Washington* v. *McGrath*, 182 F. 2d 375; *Matter of Rabouine* v. *McNamara*, 275 App. Div. 1052; *Matter of Koral* v. *Board of Educ. of City of N. Y.*, 197 Misc. 221; *Matter of Davis* v. *Impelliteri*, 197 Misc. 162; *Weinstock* v. *Ladisky*, 197 Misc. 859; *Barsky* v. *United States*, 167 F. 2d 241, 334 U. S. 843.)

II. The Feinberg Law does not infringe upon the freedoms guaranteed by the Constitution. Moreover, these freedoms are not absolute rights. They do not render the Government impotent to protect its existence as against those who advocate its overthrow by force. (*American Communications Assn.* v. *Douds*, 339 U. S. 382; *United States* v. *Dennis*, 183 F. 2d 201; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *United States ex rel. Milwaukee Social Dem. Pub. Co.* v. *Burleson*, 255 U. S. 407; *Barsky* v. *United States*, 167 F. 2d 241, 334 U. S. 843. III. Courts will not substitute their judgment for that of the legislative arm of the Government as to the necessity or desirability of a statute. (*Johnson* v. *City of New York*, 274 N. Y. 411; *People* v. *Nebbia*, 262 N. Y. 259; *Schieffelin* v. *Goldsmith*, 253 N. Y. 243; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *United States* v. *Petrillo*, 332 U. S. 1; *Secretary of Agric.* v. *Central Roig Refining Co.*, 338 U. S. 604.) IV. The Feinberg Law is constitutional under the "clear and present danger" test correctly applied. That test does not mean that legislative action may not be taken to deal with substantive threat to the nation's security before the danger is imminent. (*Dunne* v. *United States*, 138 F. 2d 137.) V. The Feinberg Law does not infringe in any respect upon the requirements of procedural due process. Moreover, no possible procedural problems in administration may be made the basis for attack upon the constitutionality of a statute itself. (*Minnesota ex rel. Pearson* v. *Probate Ct. of Ramsey Co.*, 309 U. S. 270; *American Power & Light Co.* v. *Securities & Exch. Comm.* 329 U. S. 90; *United States* v. *Petrillo*, 332 U. S. 1; *Matter of Newbrand* v. *City of Yonkers*, 285 N. Y. 164.)

Samuel M. Birnbaum and *Solomon Kreitman* for American Legion Department of New York, *amicus curiae*, in

support of respondents' position in first above-entitled action. I. Public office employment is not a right but a privilege. (*People* v. *Crane*, 214 N. Y. 154, 239 U. S. 195; *Heim* v. *McCall*, 214 N. Y. 629, 239 U. S. 175; *Atkin* v. *Kansas*, 191 U. S. 207.) II. The exclusion of teachers, etc., as defined in section 12-a of the Civil Service Law and section 3022 of the Education Law, from the public school system is a valid exercise of the police power of the State. (*Gitlow* v. *New York*, 268 U. S. 652; *Friedman* v. *Schwellenback*, 65 F. Supp. 254, 159 F. 2d 22; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216.) III. The fact that the Communist party may have received political recognition does not immunize it from an inquiry as to whether or not it constitutes a political movement which is subversive. (*Lockheed Aircraft Corp.* v. *Superior Corp. of Los Angeles Co.*, 171 P. 2d 21 [Cal.]; *Powell* v. *Unemployment Compensation Bd. of Review*, 22 A. 2d 43 [Pa.]; *Ex parte Hennen*, 13 Pet. [U. S.] 230; *White* v. *Berry*, 171 U. S. 366; *Ex parte Endo*, 323 U. S. 283; *Hirabayashi* v. *United States*, 320 U. S. 81; *Mencher* v. *Chesley*, 297 N. Y. 94; *Reiter* v. *American Legion*, 189 Misc. 1053, 273 App. Div. 757.) IV. The legislative policy set forth in the Feinberg Law is directed against all subversive movements. Its declaration with reference to the Communist party and certain of its affiliated organizations is supported by the courts, legislative findings and reports and many existing laws. (*United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707; *United States ex rel. Fortmueller* v. *Commissioner of Immigration*, 14 F. Supp. 485; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *United States ex rel. Georgian* v. *Uhl*, 271 F. 676; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279.)

Arthur Garfield Hays and *Osmond K. Fraenkel* for appellants in third above-entitled action. I. The laws and

regulations interfere with freedom of speech, of the press, and of assembly. (*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624; *Stromberg* v. *California*, 283 U. S. 359; *Thomas* v. *Collins*, 323 U. S. 516; *Winters* v. *New York*, 333 U. S. 507; *Gitlow* v. *New York*, 268 U. S. 652; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *United States* v. *Thayer*, 209 U. S. 39; *People* v. *Crane*, 214 N. Y. 154.) II. The presumption created by the Feinberg Law is unreasonabel and denies due process of law. (*Bailey* v. *Alabama*, 219 U. S. 219; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Tot* v. *United States*, 319 U. S. 463; *Pollock* v. *Williams*, 322 U. S. 4; *Mobile, J. & K. C. R. R. Co.* v. *Turnipseed*, 219 U. S. 35.)

John P. McGrath, Corporation Counsel (Michael A. Castaldi, Seymour B. Quel and *Morris Weissberg* of counsel), for respondent in third above-entitled action. I. The Feinberg Law and section 12-a of the Civil Service Law are within the constitutional power of the Legislature to regulate the efficiency and integrity of the public service and to secure the State's stability against incitements to insurrection or sedition by excluding from public service those who advocate or who are members of organizations which advocate the violent overthrow of the Government. (*United Public Workers* v. *Mitchell*, 330 U. S. 75; *People* v. *Crane*, 214 N. Y. 154; *Matter of Haslett* v. *Minetti*, 274 App. Div. 519; *Bailey* v. *Richardson*, 182 F. 2d 46; *Matter of Rabouine* v. *McNamara*, 275 App. Div. 1052; *Matter of Epstein* v. *Board of Educ. of City of N. Y.*, 162 Misc. 718, 255 App. Div. 745, 279, N. Y. 784; *Matter of McDowell* v. *Board of Educ. of City of N. Y.*, 104 Misc. 564; *People* v. *Sandstrom*, 279 N. Y. 523; *Matter of Summers*, 325 U. S. 561; *Matter of Cassidy*, 268 App. Div. 282, 296 N. Y. 926; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392; *United Steel Workers*

of America v. *National Labor Relations Bd.*, 170 F. 2d 247, 339 U. S. 382.) II. The Feinberg Law and section 12-a of the Civil Service Law do not deprive plaintiffs or any other person of freedom of speech, press or assembly. (*Cox v. New Hampshire*, 312 U. S. 569; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279; *People* v. *Gitlow*, 234 N. Y. 132, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Dunne* v. *United States*, 138 F. 2d 137; *Schenck* v. *United States*, 249 U. S. 47; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.) III. The Feinberg Law and section 12-a of the Civil Service Law do not deprive plaintiffs or any other person of liberty or property without due process of law or of the equal protection of the laws. (*American Communications Assn.* v. *Douds*, 339 U. S. 382; *Whitney* v. *California*, 274 U. S. 357; *Dunne* v. *United States*, 138 F. 2d 137; *Cole* v. *Arkansas*, 338 U. S. 345; *Bi-Metallic Investment Co.* v. *State Bd. of Equalization of Colorado*, 239 U. S. 441; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *Bowles* v. *Willingham*, 321 U. S. 503; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Bd.*, 313 U. S. 146.) IV. The Feinberg Law and section 12-a of the Civil Service Law are not bills of attainder or *ex post facto* laws, and do not violate the merit and fitness provisions of the New York Constitution. (*Cummings* v. *Missouri*, 4 Wall. [U. S.] 277; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216.)

Lewis, J. An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Education Law (L. 1949, ch. 360) commonly known, and hereinafter referred to as the Feinberg Law.[10]

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[10] The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

(Footnote continued on following page)

At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed

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(Footnote continued from preceding page)

Thompson v. *Wallin* (276 App. Div. 463) is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the Feinberg Law unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs (196 Misc. 686). At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute constitutional.

Matter of L'Hommedieu v. *Board of Regents* (276 App. Div. 494) is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing the defendants, Board of Regents and others "to disregard Chapter 360 of the Laws of 1949 [Feinberg Law], and to cease and desist from taking any steps toward the enforcement of the provisions of said law * * *and to treat said enactment as a nullity * * *." At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted (196 Misc. 686). At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

Lederman v. *Board of Education of City of New York* (276 App. Div. 527) is an action by Teachers Union, Local 555 of the United Public Workers, and others, in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings (196 Misc. 873). At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

throughout the broad field of State civil service. Thus we find that by the Laws of 1917, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

"§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

"12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or

of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature—which prefaces the three operative sections of the statute—is declaratory of conditions found by the Legislature which prompted the enactment:

"Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into

public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school

systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature."[11]

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360, added to the Education Law as section 3022, provides as follows:

"§3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown

[11] Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. * * *"

In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. (*American Communications Assn.* v. *Douds*, 339 U. S. 382, 400-401; *People* v. *Nebbia*, 262 N. Y. 259, 271.) Within those limits we examine the challenged law to determine whether, as claimed by the

appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents—after inquiry, notice and hearing—shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for appointment or retention in the service of the public school system.

In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to implement section 12-a of the Civil Service Law (quoted *supra*)—an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State—the education of its children. (N. Y. Const., art. XI, § 1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher, or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the

law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system. (See *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100; *American Communications Assn.* v. *Douds, supra,* p. 405; *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 72-73; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Hawker* v. *New York,* 170 U. S. 189, 192-197.) Those cases stand for the legal principle which prompted Judge HOLMES—as he then was—to write in *McAuliffe* v. *Mayor of New Bedford* (155 Mass. 216, 220), the familiar statement: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the Feinberg Law, is incompatible with freedoms guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preserva-

tion. We are also aware that those freedoms do not sanction unbridled license. (*People* v. *Gitlow*, 234 N. Y. 132, 137, affd. *sub nom. Gitlow* v. *New York*, 268 U. S. 652, 666-667; *Schenck* v. *United States*, 249 U. S. 47, 52.) Indeed "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." (*American Communications Assn.* v. *Douds, supra*, p. 394.) When *People* v. *Gitlow* (*supra*), reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry (pp. 666-668):

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by this Court in the *Fox Case* [236 U. S. 273], that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case* [254 U. S. 325], that a State may punish utterances teaching or advocating that its citizens

should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and *threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press,* said Story (*supra*) *does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties.* * * * *It does not protect publications prompting to overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. * * * And *a State may penalize utterance which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means.* * * * *In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.*" (Emphasis supplied.) See also, *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Gilbert* v. *Minnesota,* 254 U. S. 325, 332, 339; *Schenck* v. *United States, supra,* p. 52; *Fox* v. *Washington,* 236 U. S. 273, 276-277; *Patterson* v. *Colorado,* 205 U. S. 454, 462; *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 294; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *People* v. *Most,* 171 N. Y. 423, 431.)

In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which

threatened the wellbeing of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislative has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler* v. *Kansas*, 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." (*Whitney* v. *California*, 274 U. S. 357, 371.) Paraphrasing what was written in *Gitlow* v. *New York* (268 U. S. 652, 669, *supra*), we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * *; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Whether that danger was "clear and present"—within the rule of *Schenck* v. *United States* (*supra*, p. 52) as interpreted and applied in *American Communications Assn.* v. *Douds* (*supra*, pp. 393-400)—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership; and that members of such groups

frequently use their office or position to advocate and teach subversive doctrines.

Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

A bill of attainder has been defined as "* * * a legislative act which inflicts punishment without a judicial trial." (*Cummings* v. *Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly* v. *Village of Owego*, 45 How. Prac. 219, 257.) Furthermore, a textual examination of the provisions

of Feinberg Law—section 3022—in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provisions for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (*Cf. American Communications Assn.* v. *Douds, supra,* pp. 413-414.) In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "af-

ter inquiry, and after such notice and hearing as may be appropriate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in an organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification", as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

LOUGHRAN, Ch. J., CONWAY, DESMOND, DYE, FULD and FROESSEL, JJ., concur.

Judgment accordingly.

Appendix C

STATUTES INVOLVED and RULES OF THE BOARD OF REGENTS

Civil Service Law

§ 105.[1] *Subversive activities; disqualification.* 1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public

[1] Former § 12-a; renumbered L. 1958, ch. 790.

school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division of thereof.[2]

2. A person dismissed or declared ineligible pursuant to his position with pay for the period of such suspension or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme

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[2] Added to § 12-a (c), L. 1958, ch. 503. See § 1 of ch. 503, Declaration of Intent of the new paragraph of subdivision (c).

court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.[3]

Laws of 1958, chapter 503

Section 1. Declaration of legislative intent. The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the imple-

[3] Former § 23-a transferred to § 105 as subdivision 3 thereof, L. 1958, ch. 790. Second sentence added new. Penal Law definitions in § 2380 and § 160 respectively.

mentation and enforcement of section twelve-a of the civil service law with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law"; that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualifiation for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or

words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof[4] who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education[4] on any of the grounds set forth in section twelve-a[5] of the civil serivce law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations[5] which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a[6] of the civil service law. Such listings

[4] Underlined matter added L. 1953, ch. 681; effective April 13, 1953.

[5] The Regents on September 24, 1953 listed, after notice and extensive hearings, the Communist Party of the United States of America and the Communist Party of the State of New York.

may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Rules of the Board of Regents
(Adopted July 15, 1949)

Article XVIII

Subversive Activities

Section 244. *Disqualification or removal of superintendents, teachers and other employes.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions

of section 3021 of the Education Law or section 12-a[6] of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

[6] Now section 105.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justified such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the

United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12a[7] of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or

[7] Now section 105.

the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

REPLY

BRIEF

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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1226~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

On Direct Appeal from the Final Judgment of a Three Judge United States District Court Sitting in the Western District of New York

ANSWER TO MOTIONS TO DISMISS OR AFFIRM

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ANSWER TO MOTIONS TO DISMISS OR AFFIRM

Appellants, in support of their statement that substantial questions are presented make the following points in reply to the appellees' motions to dismiss or affirm.

Point I

Appellees in their motions to dismiss, make claim that statutes, administrative rules and procedures, involved in this law suit merely prescribe a designation for employment tightly keyed to knowing advocacy of the doctrine that the Government of the United States should be overthrown by force or violence and that the Fineburg Law is

designed merely to implement this disqualification in the university system of the State.

However, even a casual reading of the statutes involved indicate that they go far beyond this relatively definable behavior. The sweep of the statutes is measured by the requirement that no person shall be appointed to or retained in the public service of the State of New York who:

> "Prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches or embraces the duty, necessity or propriety of adopting the doctrine contained therein;" (New York Civil Service Law, Section 105, 1 (b))

and also by the fact that the range of prohibited behavior to academic personnel is further expanded where it is a felony and punishable by imprisonment for not more than ten years or by a fine of not more than $5,000.00 or both to anyone who:

> "Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means;" (New York Penal Law, Section 161 (2))

And also by the fact that one is disqualified from public employment who:

> "Openly, willfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any State or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of

> criminal anarchy;" (New York Penal Law, Section 161 (3))

or who

> "By word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine that the Government of the United States or of any State or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means;" (New York Civil Service Law, Section 105 1 (a))

From the examples given above, it will be seen that the statutes indeed go far beyond the mere advocacy of violent overthrow of the Government and as suggested in *Cramp v. Board of Public Instruction,* 368 U. S. 278 at p. 286, and in *Baggett v. Bullitt,* 377 U. S. 360 at p. 370, language less susceptible of objective understanding than this should be scruitinized closely.

There can be little doubt that where statutes of such all encompassing breadth as these are made part of the terms of a scholar's contract of employment at a State university and where such employment is conditioned upon acceptance of such terms that the "ardor and fearlessness of scholars", *Sweezy v. New Hampshire,* 354 U. S. 234 at p. 262 will certainly be checked. In the light of these statutes, it is well to remember that "we need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Weiman v. Updegraff,* 344 U. S. 183 at p. 192.

Compared to the language of this statutory complex, the provisions involved in *Cramp* and *Baggitt* were stark and rigid both in outline and detail. Yet, it is the language of this complex which the State of New York has declared to

constitute the employment terms of the academic personnel involved in this case. For a violation of any of these proscriptions, the party involved would be ineligible for continued employment and possibly criminally prosecuted.

It is no argument to state, as the defendants suggest in their motions to dismiss, that the statutes can be saved because an element of scienter could be read into them. In *Weiman v. Updegraff,* 344 U. S. 183, this court reviewed its decisions in *Adler v. Board of Education,* 342 U. S. 485; *Garner v. Board of Public Works,* 341 U. S. 716 and *Gerende v. Board of Supervisors,* 341 U. S. 56, concluding that a State loyalty statute would be upheld in any case where a requirement of scienter was made explicit in the statute. See *Morris, Baggitt vs. Bullitt:* Scienter and "Guiltless knowing behavior", 1 law in Trans. Q. 185, 208 (1964). Presently, however, scienter, without more would not uphold a loosely worded academic loyalty statute and most certainly for our purposes a loosely worded statute imposed as employment conditions on university professors. Recognizing at once the need to preserve academic freedom, and the fact that permissible academic inquiry is deterred by a vague and indefinite statute regardless of how knowing the actors behavior may be, this court has recently ruled that a state loyalty statute, with or without scienter, is unconstitutional if its effect is to deter free inquiry. See *Baggett vs. Bullitt, Supra; Cramp vs. Board of Public Instruction, Supra.* As was said in *Baggett, Supra,* at p. 368:

> "The susceptibility of the statutory language to require for swearing of an undefined variety of 'guiltless knowing behavior' is what the court condemned in *Cramp.* This statute, like the one * * * in *Cramp,* is unconstitutionally vague."

It is plain that the rule against vagueness has special force where the uncertainty pertains to the right of politi-

cal expression. This is true because uncertainty in this area operates as a prior restraint upon communications, the most noxious form.

The defendants claim in their motion to dismiss that a State employee may teach Communist theory, may write in defense of Communism, or may edit Communist literature among other things. The language of the statutory scheme in this case does not sustain their contention, and university professors are certainly justified in their fears that a chance remark included but not defined in the complex could have disasterous consequences on their careers. This is so especially in light of the fact that recently in another context a case was carried to the Court of Appeals of the State of New York with the sole view towards preventing a known member of the Communist Party merely from presenting a public address at the university. See *Egan vs. Moore,* 14 N. Y. 2d 775, 199 N. E. 2d 842.

Appellants cannot be expected to consent that the statutes and administrative rules involved in this case are part of their contract terms based on the expectation that the courts will ultimately justify any statements they may make. Such piecemeal adjudication "* * * affords safeguards too tenuous to neutralize the danger." *American Communicators v. Douds,* 339 U. S. 382 at p. 420 (Frankfurter, J., dissenting as to vagueness). Furthermore, piecemeal adjudication would delay "* * * ultimate adjudication on the merits for an undue length of time * * * a result quite costly where the vagueness of a state's statute may inhibit the exercise of First Amendment Freedoms." *Baggett v. Bullitt, Supra,* at pp. 378, 379.

The *Egan* case *Supra* indicates the truth of the statement that it is not enough to say that criminal or other sanctions may be remote. "What matters is the existence

of the weapon. Once the sword is placed in the hands of the people in power, then whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything they consider objectionable criticism of their policies." (Chaffee, Z. "Freedom of Speech", at p. 466 (1941).)

The court should note that linked with these statutes is a means of enforcement spelled out in the "Regents Rules on Subversive Activities" which provides for a systematic and continuous surveillance in which the public authorities are admonished to watch for a violation of "any of these provisions". The inhibitory effect of such a scheme with watchful eyes overlooking it is readily apparent.

Point II

Defendants also, in their motions to dismiss, defend the presumptions which the State has created from membership in certain groups upon the strength of this court's holding in the case of *Adler vs. Board of Education,* 342 U. S. 485.

It has been pointed out that in 1953 certain findings were made that the Communist Party of the United States and the Communist Party of the State of New York advocated the violent overthrow of the Government of the United States. Appellants emphasize that these findings were made thirteen years ago. Yet, the presumptions from membership still remain. No account is taken of the fact that in the ensuing years, the goals and ends of the organizations listed may have changed; yet on the strength of remote findings a burden is placed on an unfortunate individual who is found to be a member of these groups. Thus, the State need not at any disciplinary hearing prove that the organizations listed presently advocate the violent over-

throw of the Government. The State need only show that the individual involved is a knowing member of the group. It cannot be assumed that the listed organizations continue to advocate violent overthrow thirteen years after they were listed. However, even if such an assumption were valid, appellants maintain that such a fact in itself would not be enough to raise a presumption that all members of the organizations so advocate. The Communist Party has many ends and goals and it cannot be assumed that an individual member has the most offensive characteristic of the organization. The fact of the matter is that the statutes and the constructions placed upon the statutes by the courts of the State of New York fail to take account of the fact that there can be such a thing as innocent knowing membership.

In defense of this system, the State has declared that the presumptions are rebuttable and that the employee involved can rebut the presumptions with substantial evidence. The State's position, thus, is an admission that the statutes assume the guilt of the individual involved and require him to come forward and prove that in fact his knowing membership is innocent. This fact in itself indicates that the complex unconstitutionally shifts the burden of proof. See *Speiser v. Randall,* 357 U. S. 513. Aside from the fact, however, appellants ask this court to reflect upon the difficulties of proving the negative. How does a university professor establish that he does not advocate the violent overthrow of the Government? This is his real burden, since his advocacy of violent overthrow is presumed from membership. While matters of proof are generally left to the State courts, counsel submit that this court can certainly consider such problems within the entire context of this law suit. These statutes like those involved in *Cummings v. Missouri,* 71 U. S. (4 Wall) 277, assume the guilt

of the individual and assess the punishment conditionally. Thus, the statutory scheme raises an issue of fundamental significance.

A university professor may have joined the group to study it. Indeed, he might even agree with some of its aims while disavowing others. He might take part in those activities which he deems to have social importance while not taking part in any other activity repugnant to his principles. He may have joined and was working in the group in order to reorientate its goals and methods. However, the presumptions apply to such individuals as well as to those who actually advocate violent overthrow. Thus, innocent knowing members and guilty members are penalized in the same manner.

The absurdity of such a situation can be found in examples of every day life. All Republicans did not subscribe to the Party's platform in 1964. All Democrats are not social welfare enthusiasts. Neither do all members of an ethnic group share the features of those who would caricature them.

In *Schneiderman v. United States,* 320 U. S. 118, this court stated at p. 136:

> "* * * under our traditions, beliefs are personal and not a matter of mere association, and * * * men in adhering to a political party or other organization, notoriously do not subscribe unqualifiedly to all its platforms or asserted principles."

In *United States v. Brown,* 381 U. S. 437, this court, in discussing this principle, declared at p. 456:

> "Just last term, in *Aptheker v. Secretary of State,* 378 U. S. 500, we held § 6 of the Subversive Activities Control Act to violate the constitution because it "too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that § 6 inflicted

its deprivation upon all members of Communist organizations without regard to whether there existed any demonstrable relationship between the characteristics of the person involved and ther evil Congress sought to eliminate, i.d., at 509-511."

Appellants ask this court to forge the sane and sensible rule that in any dismissal proceeding, the State must prove that the individual involved personally has the characteristics which are deemed to be offensive, rather than assuming them initially from membership. It appears that this court has moved towards that end in the recent cases of *Aptheker v. Secretary of State,* 378 U. S. 500, and *Elfbrandt v. Russell,* 34 U. S. L. week 4347.

Adler v. Board of Education, Supra, should be overruled to the extent that it is inconsistent with what has been stated above. To overrule *Adler* in this respect will at last eliminate the doctrine of guilt by association which as a legal thesis, represents an aberration on the American scene.

The presumptions which the State has created will, of course, deter academic personnel and others at the State University of New York from associating themselves with any of the groups in question. This is so in view of the harsh economic consequences which would in fact accrue to an individual who is found to be a member of the proscribed groups and who was unable to surmount the difficulty of proving his loyalty to the United States. It can be observed that perhaps our greatest knowledge of the Communist Party has come from those who at one time or another were members of the organization. These statutes will inhibit those of our society from joining the organization who are in the best position to study it, namely, academic personnel. Indeed, if in fact, the organizations do presently advocate the violent overthrow of the govern-

ment, there are serious implications resulting from a policy which deters those from becoming members who would, in fact, wish to change the organizations' ends and goals and reorientate it in its methods. The deterance of this type of innocent knowing membership in the manner effected by these statutes is a matter of profound significance.

Conclusion

For the reasons stated above and in Appellants' original statement, probable jurisdiction should be noted.

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BRIEF FOR THE APPELLANTS

SEP 30 1966
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IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

Opinions Below

The unanimous opinion of the three man United States District Court sitting in the Western District of New York was rendered on January 5, 1966 and is set out in the record at pages 278-299. The opinion of the District Court sitting alone and holding that no substantial federal question was raised in this case is reported in 233 F. Supp. 752 (W. D. N. Y. 1964). The decision of the Circuit Court of Appeals reversing and holding a substantial question is presented, is reported in 345 F. 2d 236 (2nd Cir. 1965).

Jurisdiction

This class action was instituted on July 8, 1964 under Section 1 of the Fourteenth Amendment to the Constitution of the United States, as that Amendment exists independently of the First Amendment and as that Amendment incorporates the First and Fifth Amendments; further, under Article 1, Section 10, Clause 1 and Article 6, Clause 2 of the Constitution of the United States, and further, under Section 1343 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code, to pass on the constitutionality of Sections 3021 and 3022 of the New York State Education Law, Section 105 of the New York Civil Service Law, Section 244, Article XVIII of the Rules of the Board of Regents of the State of New York, and the certificates required thereunder to enjoin the appellees, each of whom is either an official body or officer of the State of New York, from enforcing the rules and statutes complained of.

By decision filed on January 5, 1966, the District Court gave judgment for the appellees and denied all relief requested by appellants. Notice of appeal was filed in the District Court for the Western District of New York on

February 14, 1966. On April 16, 1966, the Jurisdictional Statement was filed in this Court and on June 20, 1966 this Court noted probable jurisdiction (record, p. 304).

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Baggett v. Bullitt*, 377 U. S. 360; *Shelton v. Tucker*, 364 U. S. 479; *Florida Lime and Avacodo Growers, Inc., v. Jacobsen*, 362 U. S. 73. And see, *Sweezy v. New Hampshire*, 354 U. S. 234; *Speiser v. Randall*, 357 U. S. 513 and *Cramp v. Florida*, 368 U. S. 278.

Statutes, Administrative Rules and Certificates Involved

The provisions of law involved in this case are: Section 105 of the New York State Civil Service Law, Sections 3021 and 3022 of the New York State Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, Sections 160 and 161 of the New York State Penal Law, and Feinberg Certificates, Forms A and B. Because of their length, the texts of these provisions and the certificates involved are set out in Appendices A through F to this Brief.

Questions Presented

1. Whether the New York statutory complex, together with the administrative regulations, rules and certificates unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment Freedoms.

2. Whether the New York statutory complex involved, together with the administrative rules, regulations, pro-

cedures and certificates, unconstitutionally deprive appellants of due process of law.

3. Whether the New York statutory complex involved, together with the administrative rules, procedures and certificates, constitute a bill of attainder.

4. Whether the statutory complex involved, together with the rules, procedures and regulations and certificates, constitute an *ex post facto* enactment.

5. Whether the complex involved herein is invalid insofar as it deals with matters preempted by existing federal legislation.

6. Whether the doctrine of abstention is applicable to this case.

Statement

This suit challenges the constitutionality of Section 105 of the New York State Civil Service Law and the statutes incorporated by reference therein, Sections 3021 and 3022 of the New York Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York (hereinafter referred to as the "Regents Rules"), and the certificates and procedures used under the various statutes and rules.

On March 31, 1949, the governor of the State of New York approved Chapter 360, Laws, 1949, being "an act to amend the Education Law in relation to eliminating from the public schools superintendents, teachers and employees who are members of subversive organizations", popularly known as the Feinberg Law. The law added a new section to the Education Law (Section 3022), the first subdivision of which directs the Board of Regents to adopt and enforce rules and regulations for the elimination of

persons barred from employment in the public school systems of the State on any of the grounds set forth in former Section 12-A of the Civil Service Law (now Section 105, as amended) and Section 3021 of the Education Law. The second subdivision of the section further provides that the Board of Regents shall, after inquiry, make a listing of organizations which it finds to be subversive on the various grounds set out in former Section 12-A (now Section 105, as amended) of the Civil Service Law and to provide that membership in such organizations is *prima facie* evidence of disqualification for employment or retention in any office or position in the public schools of the State.

On July 15th, 1949, Article XVIII, Section 244 of the Rules of the Board of Regents, entitled "Subversive Activities", was adopted by the Board of Regents in pursuance to the provisions of the Feinberg Law. These Rules provide, in effect, that the school authorities shall put into operation certain procedures for the disqualification and removal of employees who violate Section 3021 of the Education Law or former Section 12-A (now Section 105, as amended) of the Civil Service Law. In essence, the Rules provide that prior to appointment of any employee, the nominating official shall inquire of his former employers and others whether he is known to have violated the statutory provisions involved, and no person found to have violated the said statutory provisions shall be eligible for employment. Each year the school authorities shall prepare a report on each employee, stating whether there is any evidence, indicating that the employee has violated the statutes involved and any evidence of membership in an organization listed as subversive by the Board of Regents. If there is found to be such evidence, the reporting official shall recommend the employee's dismissal and within ninety days thereafter, the school authorities must either prefer

formal charges or reject the recommendation. In cases where the school authorities find that in their judgment the evidence indicates a violation of the statutory provisions, they shall immediately commence dismissal proceedings.

Shortly after the passage of the Feinberg Law, and the adoption of the Regents Rules, three cases were brought in the State Courts challenging their validity. (*Thompson v. Wallin,* 276 App. Div. 463; *L'Hommedieu, et al. v. Board of Regents, et al.,* 276 App. Div. 497; and *Lederman, et al. v. Board of Education,* which was subsequently to be known as *Adler v. Board of Education,* 276 App. Div. 527. Ultimately, these cases reached the New York Court of Appeals, which sustained the constitutionality of the challenged law and rules in a single opinion covering all three cases, *Adler v. Board of Education,* 301 N. Y. 476. Thus the Court gave judicial sanction to a procedure by which the Board of Regents could promulgate lists of allegedly subversive organizations and on the basis of such lists declare those employed in the educational system of New York to be *prima facie* disqualified from *all public employment* solely because of their membership in proscribed organizations. The holding was affirmed by the United States Supreme Court in *Adler v. Board of Education,* 342 U. S. 485 (1952).

Subsequent to the Supreme Court decision in *Adler,* and in 1953, by virtue of an extremely significant amendment to Section 3022 of the Education Law (New York Laws, 1953, Ch. 681), the applicability of the entire complex of laws was expanded to include not only the public schools, but institutions of higher learning as well, thus extending its cover to thousands of employees and educators in the State University system. In retrospect, it can be observed that this amendment set the stage for the present suit. In September, 1953, pursuant to New York Education Law,

Section 3022, the Regents listed the Communist Party of the State of New York and the Communist Party of the United States as proscribed organizations, and on May 10, 1956, an *Ad Hoc* Committee of the Board of Trustees of the State University of New York established the so-called Feinberg Certificate (see Appendix E, for original and modified version). Both certificates provide:

> "Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York, or any political subdivision thereof, cannot be employed by the State University."

The certificates further declare that the subscriber has read the Regents Rules, that the Regents Rules and the statutes cited therein constitute the terms of his employment, and that he is not now a member of the Communist Party, and if he had ever been a member, he has communicated that fact to the president of the University. These certificates were apparently circulated throughout the State University system and refusal to subscribe to the certificate was made a ground for dismissal on grounds of insubordination. With respect to the certificate, it should be emphasized that it is a duality. In effect, it makes inquiry into past and present associations, but even more importantly, it requires an employee, or prospective employee to consent that certain offensive statutes shall form a part of his contract of employment. This aspect of the case will be further elaborated upon in the argument below.

In 1958, Section 12-A of the Civil Service Law was amended and renumbered Section 105 (New York Laws, 1958, Ch. 790). The amendment (Civil Service Law, Section 105(3)), is captioned "Removal for Treasonable and Seditious Acts or Utterances", and provides:

> "A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the Penal Law; a seditious word or act shall mean 'criminal anarchy' as defined in the Penal Law."

This amendment, with its references to the Penal Law, raises a question as to the affect of Sections 160 and 161 of the New York Penal Law on all the provisions here involved. Further, in 1958, a new section was added to Section 12-A(c) (New York Laws, 1958, Ch. 503), which provides:

> "For the purposes of this section, membership in the Communist Party of the United States of America or the Communist Party of the State of New York, shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

This section naming the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations, brings into focus the question as to whether the complex here involved is a bill of attainder.

Prior to 1962, the University of Buffalo was a private institution. However, as of September 1st, 1962, the University of Buffalo was merged into the State University system of the State of New York (Record p. 19). Sometime thereafter, all members of the academic staff of the State University of New York at Buffalo were required to sign the certificate known as the Trustees Certificate, previously alluded to as a condition of their continued employment.

It can be observed that the State University of New York employs approximately 17,000 persons (of whom approximately 15,000 are full time), and that all of these employees are subject to the procedures of the State University of New York for the administration of Section 3022 of the New York State Education Law (Record p. 18). Approximately 1,000 full time and 800 part time persons are employed by the State University of New York at Buffalo, in the unclassified service (those whose principal functions are teaching or the supervision of teaching). Of the persons employed by the State University of New York in the unclassified service at the time of the commencement of this action, the appellants, other than Starbuck, are the only persons who had refused to sign either of the certificates in connection with the continuation of their employment with the State University of New York. This is so despite the fact that many other persons in the same class as the aforementioned four appellants had objected to the requirement to sign either of the said certificates (Record p. 18). The repugnance for the certificates and procedures involved with respect to the Feinberg Law is strikingly apparent in the fact that at a meeting of between 300 and 400 members of the American Association of University Professors at the State University of New York at Buffalo Chapter, certain resolutions protesting the certificates, procedures and laws were adopted (Record pp. 27-29). At the time this action was commenced, however, only appellants Keyishian, Hochfield, Garver and Maud had not yet signed the certificates in question. Thus, the State of New York, by threatening its educators with dismissal from employment was effectively able to coerce hundreds of its educators into consenting that certain statutes which they found offensive should form a part of their employement and contract terms. It seems clear that the threat of loss of em-

ployment provides a weapon uniquely suited to mute protest and bring about doctrinal conformity.

As previously indicated, appellants Keyishian (formerly an Instructor in English), Hochfield (Associate Professor of English), Garver (Lecturer in Philosophy), and Maud (formerly Assistant Professor in English) all under differing term appointments to the academic staff at the State University of New York at Buffalo, declined to sign the Trustees Certificate. These appellants were subsequently notified that due to their failure to sign, dismissal proceedings were being undertaken against them on the grounds of insubordination (Record pp. 263-273). Appellants were further notified that their terms would not be renewed if they did not sign the certificates as requested. The term of appellant Keyishian has ended and his appointment has not been renewed. The terms of Hochfield and Garver have not expired and they remain in their former positions. They have been informed that dismissal proceedings will be held in abeyance pending a determination of the validity of the statutes, rules and procedures here involved. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the University. Appellant Starbuck was appointed by the State University of New York at Buffalo on September 1st, 1963, under a one-year contract as a Specialist in Acquisitions, and, in addition, in January 1964 was appointed as a Lecturer in English. Subsequent to the former appointment, Mr. Starbuck was required to subscribe and answer under oath to the following question:

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions

thereof should be overthrown or overturned by force, violence, or any unlawful means?"

The question, in written form, was one of several put to Starbuck by means of a New York State Civil Service form (Pr-75) and was styled question "7" (Record p. 212). The question requires a written "Yes" or "No" answer and appellant Starbuck could be prosecuted for perjury for falsely answering it.

Starbuck was apparently not required to execute the Trustees certificate for the reason that he was considered to be a temporary employee in the classified service of the State of New York, which is one of the two major divisions of the New York Civil Service. The other division (unclassified service) consists of those whose "principal functions are teaching or the supervision of teaching". It is clear, however, that Starbuck is covered under all the provisions of this complex including Education Law Sections 3021 and 3022 and the Rules of the Board of Regents.

Appellant Starbuck declined to answer the question and as a result was dismissed from his appointment on June 18, 1964.

In view of the actual and threatened dismissals and actions of those bound to enforce this complex, there can be no claim that this lawsuit deals with provisions in the abstract. The appellants are "threatened with action under the law", *Adler v. Board of Education*, 342 U. S. 485 at 504 (Frankfurter, J., dissenting) and "Steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law", *Adler, supra*, at 504 (Frankfurter, J., dissenting). Indeed, all the appellants involved in this case have already been injured by reason of certain actions taken against them by those charged with adminis-

tering the statutes and rules with which we are here concerned. For example, prior to November 4, 1964, promotions or salary adjustments recommended by the State University of New York at Buffalo would not be made or recommended by the administrative officers of the State University of New York in the case of employees who had failed to sign the Trustees Certificate. For this reason, a discretionary salary adjustment of $326.00 annually was not given to appellant Hochfield, effective September 3, 1964. Such adjustment was later made effective December 26, 1964 (Record p. 26). A course of instruction to be taught by appellant Garver in the night school at the State University of New York at Buffalo for the first semester of 1964, commencing in September 1964, was cancelled because of his failure to sign the certificate and consent that the rules and laws were part of his contract terms (Record p. 26). Appellant Maud was not recommended for promotion to Associate Professor, III, effective September 3, 1964, because of his failure to sign the certificate. However, he was promoted to this position effective January 1965. Further, Appellant Maud was not appointed to teach a class in the night school at the State University of New York for the fall semester commencing 1964 because of such failure on his part (Record p. 26).

Additionally, this Court is presented in this case with a striking, and perhaps, even a frightening example of the coercive force generated by the use of a threat of dismissal from employment. A really significant factor involved here is that many other persons in the same class as the aforementioned four appellants had objected to the requirement that they sign the certificates and the requirement that they consent that the statutes and rules involved should form a part of their employment terms.

The fact that so many were opposed to the certificate and laws and so few refused to sign indicates that the State, by theatening its educators with dismissal from employment, has utilized a weapon of uncommon effectiveness. The fact that the educational elite of a great university can be coerced into giving up their First Amendment rights in such a manner certainly indicates the truth of the statement that these rights are "fragile and delicate" and capable of being suppressed without too much difficulty, at least where dismissal from employment is the weapon used. Thus, unlike the *Adler* case, this Court is presented with the very real problem of the application of this complex.

On July 8th, 1964, appellants commenced the present class action in the United States District Court for the Western District of New York, seeking an injunction against the enforcement of the statutes involved in this case and of the regulations and procedures used to implement these statutes. The District Court held that no substantial federal question was raised, and accordingly, refused to refer the case to a three judge district court, 233 F. Supp. 752 (W. D. N. Y., 1964). An appeal was taken to the United States Court of Appeals for the Second Circuit which Court reversed and directed that the case be heard before a three judge court, 345 F. 2d 236 (2d Cir., 1965). The Court noted that Civil Service Law, Section 105(3) had been added after the *Adler* decision and observed that there was a significant similarity between the laws in question here and those held unconstitutional in *Baggett v. Bullitt,* 377 U. S. 360.

Judge Marshall, in speaking of the *Adler* opinion, also stated that it had held Section 3022 constitutional as applied to teachers in the public schools but that the Supreme Court had not considered the application of Section 3022

to university faculty, and had refused to pass upon the constitutionality of Section 3021. The Court of Appeals decisively rejected the notion put forth by the appellees that public employment may be conditioned upon the surrender of First Amendment freedoms with these words:

> "* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents,* 345 Fed. 2d 236 at 239.)

It called attention to the statement in *Weiman v. Updegraff,* 344 U. S. 183, 192, that public employment may not be denied on "patently arbitrary or unreasonable" grounds.

On June 10, 1965, one week before the argument to the three judge court, the Board of Trustees of the State University of New York unanimously adopted certain resolutions (Appendix F) which in effect declared that it would no longer be the policy of the State University of New York to require as a condition for employment the execution of the certificates of the type previously referred to. "New" procedures for appointments were instituted. These procedures provide essentially that Section 105 of the New York Civil Service Law and Sections 3021 and 3022 of the New York Education Law and the Rules of the Board of Regents still constitute the terms and conditions for employment and retention in employment of any teacher or scholar. (The full panoply of the statutes, rules and procedures are set out in Appendices A-F). Furthermore, the resolution provides that anyone employed prior to the effective date of the resolution shall not be deemed ineligible for employment "solely" by reason of his failure to sign the certificates involved. Thus, in addition to providing that certain offensive statutes are still part of the professors' contract terms, the resolution maintains the constitutional issues raised by the certificates as well.

On June 16, 1965, a three judge district court, sitting in the Western District of New York, heard arguments on the merits in this case, and on January 5, 1966, the same court rendered a decision and order denying all the relief requested by the appellants (Record p. 300). Thereafter, and on February 14, 1966, the appellants filed in the Federal District Court for the Western District of New York a notice of appeal to this Court. On April 16, 1966, appellants filed their statement as to jurisdiction, and on June 20, 1966, this Court noted probable jurisdiction (Record p. 304), thus bringing this case to its present posture.

Summary of Argument

Appellants, university professors and personnel, and others similarly situated in the State University of New York have been required to consent that certain statutes, administrative rules and procedures shall form a part of their contract terms. A failure to so consent results in dismissal from employment.

I

The statutes in question are unconstitutional and void both on their face and as they have been construed and applied to appellants and to all others similarly situated. They proscribe and infringe upon rights of speech and association which are protected by the First and Fourteenth Amendments to the United States Constitution.

Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law are invalid on their face due to language which is unduly vague, uncertain and broad. Specifically, appellants maintain that the requirement that they refrain from "* * * the utterance of any

treasonable or seditious word * * *", or from "* * * the doing of any treasonable or seditious act * * *" is a proscription so uncertain of objective measurement or ascertainment as to fall far short of the requirements of due process. Appellants maintain further that the words "criminal anarchy" as they stand alone and as defined in Sections 160 and 161 of the Penal Law and as construed are unconstitutionally vague. Further, the statutes eliminate from academic employment any person who "* * * advises or teaches the doctrine that the Government of the United States * * * or of any political subdivision thereof should be overthrown or overturned by * * * any unlawful means; or prints, publishes, edits, issues or sells any * * * written or printed matter in any form containing or * * * advising * * * the doctrine that the Government of the United States or of * * * any political subdivision thereof should be overthrown by * * * any unlawful means, and who * * * embraces the * * * propriety of adopting the doctrine contained therein; or * * * becomes a member of any * * * group of persons which teaches or advocates that the Government of the United States or of * * * any political subdivision thereof shall be overthrown by * * * any unlawful means." Appellants maintain that the statutory language quoted above enjoins conduct in terms so patently vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and which language consequently is violative of appellants' rights of due process. Appellants maintain further, regardless of the vagueness of the language itself, that the prolixity and profusion of the language and the manifold references in the statutes, rules and certificates herein complained of to interrelated provisions, and the uncertainty as to the identity, effect, or pertinence of certain of said provisions results in a vague and uncertain understanding of

what behavior is proscribed and therefore, of itself, constitutes a denial of due process.

Appellants and all other similarly situated are prohibited from engaging in constitutionally protected speech and association and further incur substantial risk of unfair prosecution for deviations from a vague and unconstitutionally broad standard. Moreover, all appellants herein are enjoined from conduct clearly protected by the First and Fourteenth Amendments and are especially deterred from engaging in such lawful conduct by the continual investigative and inquisitorial procedures required by the Rules of the Board of Regents. The requirement of said rules that one's superiors report on observed deviations from standards so vague and overly broad as those presently complained of is especially repugnant to the First Amendment inasmuch as it operates inevitably to deter free speech and to discourage controversial and socially desirable discussion and association. Further, such proscriptions are not justified by a subordinating regulatory interest which is compelling. The statutes, rules and procedures, certificates, and oaths herein complained of infringe plaintiffs' constitutionally protected rights in the absence of any substantial danger from which the State must necessarily protect itself by resort to such measures, and by reason of the fact that they impose a broader standard of disqualification than can be utilized where the conduct proscribed would be punishable by criminal penalties.

II

The statutes and rules, certificates and questionnaires complained of by use of invalid statutory presumptions shift the burden of persuasion and proof to appellants. By their very presence these presumptions inhibit and

deter appellants and others similarly situated from becoming members of proscribed organizations and thus, interfere with and deter innocent knowing membership in said groups violating in process appellants' freedom of association and academic freedom.

The complex further forces appellants to choose between possible self-incrimination or public employment and thus, constitutes a violation of due process of law.

The failure to accord a hearing to persons refusing to consent that the complex forms a part of their contract terms, upon denial of an initial appointment or renewal of appointments, and the failure to accord a hearing to persons under dismissal proceedings wherein such persons can explain and have considered their grievances and objections relative to such consent constitutes a denial of procedural due process. In effect, a refusal to consent produces inferences of disloyalty and guilt and, moreover a conclusion of unfitness for employment, which conclusion is arbitrary and discriminatory. Such automatic and summary procedures are unreasonable and lacking in the degree of fairness required by due process since persons refusing to consent are afforded no opportunity to have conscientious objections for their refusal considered, which objections may be based on a *bona fide* belief that the statutes, administrative rules and regulations unlawfully proscribe constitutionally protected speech, or upon an uncertainty of what conduct is proscribed due to the vagueness, prolixity and profusion of the statutes and rules referred to.

III

The complex is a Bill of Attainder. By use of certain statutory presumptions it assumes the guilt and nonem-

ployability of members of certain proscribed organizations while at the same time casting upon those members the burden of refuting the inferences drawn. Thus, the complex assumes the guilt and assess the punishment conditionally, a form of Bill of Attainder similar to that declared unconstitutional in *Cummings v. Missouri*, 71 U. S. 277.

IV

The complex is an *ex post facto* enactment. It mandates that past membership in certain proscribed groups shall be presumed to have continued unless termination of such membership in good faith can be shown. Failure to show such good faith termination results in a dismissal from public employment on the grounds of "subversion". By imposing the punishment of dismissal from employment for past activities in this manner the complex punishes innocent past acts and is therefore, unconstitutional.

V

The complex proscribes activity and imposes disabilities for conduct directed against the United States and thus, is invalid insofar as it deals with matters preempted by existing federal legislation.

ARGUMENT

I

The statutory complex involved, together with the administrative regulations and threats of sanctions and punishments form a unique system which unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment freedoms made applicable to State action under the Fourteenth Amendment.

A. Prior decisions of the Supreme Court are not opposed to the claims raised by the appellants in this case.

The controlling effect of prior Supreme Court holdings must necessarily be minimized in this suit for two reasons. First, since the complaint in this case is founded at least in part upon the vagueness of statutes which are both unique and highly complex, of logical necessity the alleged infirmities must be carefully and individually scrutinized, and second, in any case dealing with First Amendment freedoms, especially freedom of speech and association, this Court has stated that an adjudication must go forth carefully on a case by case analysis. "In each case courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger." *Dennis v. U. S.*, 341 U. S. 494 at 510.

At the outset, we should direct our attention to the case of *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952) for the reason that the Court below relied heavily upon it. *Adler* does not dispose of the issues in this case. The complaint in *Adler* was directed only at Section 3022 of the Education Law and 12-A of the Civil

Service Law. Although the appellants in *Adler* argued before the Supreme Court that Section 3021 was unconstitutionally vague, the court abstained from ruling upon the question since the issue had not been raised below. See *Adler, supra,* at page 496. In fact, the attack upon the statutes in *Adler* on the grounds of vagueness was limited to the single word "subversive" as it appears in Section 3022 of the Education Law. See *Adler, supra,* at page 496. The present complaint is more broadly framed; plaintiffs challenge the statutory scheme as a whole, charging that its complexities are so profound and so pervasive as to render the entire network unconstitutionally vague. Counsel particularly direct the Court's attention to the fact that the present complaint attacks the vagueness of the proscriptions set out in Section 105(1)(a), (b), and the first paragraph of (c), as well as the remainder of Section 105 of the Civil Service Law. Emphasis is placed upon this fact for the reason that although the Supreme Court in *Adler* stated that it found no constitutional deficiency in 12-A of the Civil Service Law, an examination of the briefs in the Supreme Court in that case discloses that *the unconstitutionality of that section was not pressed in the Supreme Court; indeed, it was not even argued as both sides conceded the constitutionality of 12-A.* (Appellant's brief, pp. 5-6, 9; appellees' brief, p. 16.) Thus the challenge in the original *Adler* case was directed only at the implementing legislation (Section 3022 and Section 3021 of the Education Law) and not to 12-A on its face.

> "The issue is not whether Communists should be allowed to teach in the public schools, nor even whether persons who advocate the overthrow of the government by force should be allowed so to teach—the old law (Civil Service Law Section 12-A) adequately takes care of such persons. The issue is whether lists should be promulgated of organizations which an administra-

tive agency, without particular competence in that field, has declared advocate the overthrow of the government by force." (Appellants' brief, in original *Adler* case, p. 9).

It is not surprising, therefore, that Section 12-A was so casually passed over by the Supreme Court without analysis or discussion. *Adler*, therefore, does not control on the issue of the constitutionality of the language of former Section 12-A, since sound reason requires that for this question to have been foreclosed by prior adjudication, it would be necessary for this Court to have ruled upon the very language here attacked. *Adler* is further not dispositive of the issues in this case for the reason that subdivision 3 of Section 105 of the Civil Service Law was added by the New York Legislature in 1958 (New York Laws, 1958, Ch. 790). This provision, not having existed at the time *Adler* was decided, of course, has not been foreclosed from consideration by that decision. Moreover, this subdivision, with its references to the Penal Law, raises the question of the effect of Sections 160 and 161 of the New York Penal Law upon all of the provisions here involved. Additionally, in 1958, a new paragraph was added to Section 12-A(c) (N. Y. Laws, 1958, Ch. 503). This paragraph, naming the Communist Parties of the United States and of the State of New York as proscribed organizations was added long after the *Adler* decision.

The Trustees Certificate, having been established by an *Ad Hoc* Committee of the Board of Trustees on May 10, 1956, also was not in existence when *Adler* was decided and the very important constitutional questions which it raises are not foreclosed by that decision.

Additionally, the alleged discontinuance of the Trustees Certificate, one week before the argument before the three man court, and the institution of "new" procedures on new

academic appointments raise a great many questions not before the Court in *Adler*. While these new procedures will be discussed more fully below, the Court's attention should be directed to the fact that the procedures indicate that Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law and the Rules of the Board of Regents with respect thereto, still constitute conditions and terms of retention or appointment to the University. Thus, the discontinuance of the certificates has not affected the issues presented by this suit. Further, it should be observed that while the certificates have been discontinued, the resolution which allegedly discontinued them indicates that they are still to be deemed to have some viability for the reason of the fact that no person shall be deemed ineligible "solely" by reason of his failure to execute the certificate (Appendix, F).

With respect to the original legislation before the court in the *Adler* case, it can clearly be stated that the Feinberg legislation was particularly directed to safeguarding public school children from supposed subversive influences. This can be observed from reading the declaration of policy of the Legislature which prefaced the operative sections of the original legislation (Record, p. 246).

For example, the Legislature, in speaking of the need to prevent the infiltration of subversives into the public schools, declares:

> "The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership" (Record, p. 246).

The declaration of policy then goes on to state that:

> "The Legislature further finds and declares that in order to protect the children in our state from such

> subversive influence, it is essential that the laws prohibiting persons who are members of subversive groups, such as the Communist Party, and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced" (Record, p. 246).

It is clear, therefore, that the *Adler* holding was developed in the context of protection for immature minds from conflicting philosophies and that its rationale did not reach other educational levels. The New York Legislature recognized this feature of the *Adler* decision and by a 1953 Amendment to Section 3022 of the Education Law (N. Y. Laws, 1953, Ch. 681), the applicability of the section (and consequently of 105 of the Civil Service Law which is incorporated by reference therein) was extended to include, not only public schools, but institutions of higher learning as well. This provision was not before the court in *Adler*. Considering that the statutes which this amendment modifies impose serious restrictions upon free inquiry, the impact of this amendment cannot be lightly brushed aside. Our society relies heavily upon its institutions of higher learning as a source of new ideas. The challenge to orthodox political notions, however disconcerting it may be, or however repugnant it may be to the statutes presently in force in New York, is nevertheless valuable to our political selfawareness. By so depriving our professors and their students of free inquiry, we stimulate the kind of smugness presently seen to impose perhaps a graver threat to our institutions than any which has preceded it. See generally, *Morris, Baggett v. Bullitt;* Scienter and "Guiltless Knowing Behavior", 1 Law in Trans. Q. 185, 189 (1964). The public school and the institution of higher learning are designed to function at different levels and to reduce the latter to the level of the former is to destroy entirely its *raison d'etre.*

Another new and pervasive influence upon the statutes complained of arises from the reference in Section 105(3) of the Civil Service Law to the New York Criminal Anarchy Statute (N. Y. Penal Law, Sections 160, 161). It will be seen that in attempting to assign some meaning to the words "seditious utterance or act", the New York Legislature has further circumscribed the permissible conduct of those affected by the statutes and rules complained of. This amendment was added in 1958, long after *Adler* was handed down (see N. Y. Laws, 1958, Ch. 790), and since it affects not only the section in which it appears, but Section 3022 of the Education Law and the Regents Rules as well, these provisions must now be carefully analyzed as to their bearing in the present suit.

Thus, in essence, it is a vastly different statutory scheme which is here attacked than that which was before the court in *Adler*. Furthermore, the parties attacking the statutes have interests which differ considerably from those parties in the original *Adler* proceeding. As to *Adler's* substance, it can be observed that the court adhered to the concept of public employment, academic or otherwise, as a privilege. See *e. g., Bailey v. Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), aff'd., 341 U. S. 918 (1951). It was said in *Adler* that teachers had "* * * no right to work for the state in the school system on their own terms * * *. If they [did] not choose to work on such terms, they [were] at liberty to retain their beliefs and associations and go elsewhere", *Adler, supra,* at page 492. Thus, ultimately, the Court said, no freedoms have been denied a teacher in this way. The Court in *Adler,* therefore, adhered to the proposition that since government employment could be denied altogether, it could be conditioned upon the relinquishment of First Amendment liberties. This Court subsequent to *Adler* has clearly de-

parted from the central anchor of that case. As was stated in the Court of Appeals in *Keyishian v. Board of Regents*, 345 F. 2d 236 (2nd Cir., 1965):

> "* * * The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. In less than a year after *Adler* the Supreme Court clearly limited its language in *Adler*:
>
> > 'We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Weiman v. Updegraff*, 344 U. S. 183, 192 * * * (1952)' " (*Keyishian, supra*, p. 239).

See also *Sherbert v. Verner*, 374 U. S. 398 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of a condition upon a benefit or privilege" at p. 404). *Weiman v. Updegraff*, 344 U. S. 183 at 192; *Torcaso v. Watkins*, 367 U. S. 488, at 495 through 496; *Cramp v. Florida*, 368 U. S. 278, at 288 and *Slochower v. Board of Education*, 350 U. S. 551, at p. 555.

Additionally, *Adler*, upheld the presumption of disqualification found upon membership in proscribed organizations on the basis of the "generality of experience". The court used the following language at pages 494-495:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing that the organization stands for, namely, the overthrow of government, by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion."

Since *Adler*, this Court has shifted its emphasis and has recognized the dangers to liberties inherent in a system

which shifts the burden of proof. In *Speiser v. Randall*, 357 U. S. 513, this Court struck down a California oath, which was required to be executed in order that property owners could qualify for a tax exemption. In that case, this Court, at page 526, declared:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf., Dennis v. U. S.* * * * provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly. It can only result in a deterrence of speech which the constitution makes free."

The *Speiser* case, decided in the context of an oath, provides a measure of protection against the procedural device (the presumption) utilized in *Adler* and thus represents a weakening of the *Adler* rationale with respect to that presumption. See also *Aptheker v. Secretary of State*, 378 U. S. 500; *Elfbrandt v. Russell*, 34 U. S. L. W. 4347.

The *Adler* decision also fails to take account of the more lately recognized importance of academic freedom, *Sweezy v. New Hampshire*, 354 U. S. 234, and was decided before this Court fully recognized the constitutional right of private association. *N. A. A. C. P. v. Alabama*, 357 U. S. 449. Furthermore, *Adler* relied in part on *Garner v. Los Angeles*

Board, 341 U. S. 716 (1951), for a point which was expressly not considered in *Garner*, and about which the Court stated at page 720, "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation [in the Communist Party, U. S. A.] justifies his discharge."

In New York, affirmative disclosure of the information being elicited would result in "*prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or any city or civil subdivision thereof." New York Civil Service Law, Section 105, New York Education Law, Section 3022(2).

The reason for this is that past membership in a subversive organization is "presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Rules of the Board of Regents, Article XVIII, Section 244(2).

Also, the Court's reliance in *Adler* on the *Garner* case is not applicable here for the reason that *Garner* did not consider the interest of a state, nor those of a professor, nor those of society in academic freedom on the university campus. *Garner* does not speak of this set of relationships. That the interests of both a state and an employee in the municipal civil service differ materially and fundamentally from a state's interest in its professorial faculty and a professor's interest in academic freedom cannot be denied. Whatever the interest the state may have in minimally restricting the speech and association of municipal civil servants as a condition of their employment, that interest is, obviously, not of the same order as its interest with respect to the speech and association of faculty members, and this Court has so recognized in *Sweezy, supra*, decided

subsequent to *Adler* and *Garner*. The Court's opinion below indicated that this Court's disposition in *Gerende v. Board of Supervisors*, 341 U. S. 56 has a strong bearing on the issues involved in this case. The *Gerende* case does not dispose of any issues in this case. In *Gerende*, this Court affirmed the judgment of the Maryland Court of Appeals on the grounds that "a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the Government by force or violence' * * *". *Gerende, supra* at page 67. This Court did not have before it Section 15 of Maryland's Ober Act, which broadly defines a "subversive person," as the Maryland Court had held that the section did not apply to *Gerende*. *Shub v. Simpson*, 76 A. 2d 332 at 341.

Neither is this case controlled by *Konigsberg v. State Bar*, 353 U. S. 252 (1957) and *In re Anastaplo*, 366 U. S. 82, for the reason that has been stated above that there is a difference between a state offering a "privilege" and the state legislating conditions of state employment. Neither is this case controlled by *Beilan v. Board of Education*, 357 U. S. 399 (1958), for the reason that in the *Beilan* case the individual involved there could have given the required information and still retained his employment. It will be noted that in the State of New York that result is not the case. The system is exclusionary and not designed to secure information only. For similar reasons, *Lerner v. Casey*, 357 U. S. 468 (1958) and *Nelson v. Los Angeles*, 362 U. S. 1, do not control. For the reasons set forth above a mere recitation of citations involving the employee dismissal cases will not answer the issues raised by the case at bar.

More is at stake in this case than the questions merely of inquiry and the scope of inquiry which can be carried

on by a public authority. The statutory scheme in question is not primarily designed to elicit information. It is exclusionary. It is designed to exclude from the public service certain individuals who fall within its proscriptions. It is with statutory employment conditions that we deal with here. It thus becomes necessary to critically analyze these employment terms in an attempt to resolve their reasonableness, especially when viewed with regard to First Amendment freedoms and the interests of those whom society should guard most strongly—its academic personnel.

B. The statutes, administrative regulations and procedures, interfere with, deter, and have an unconstitutionally inhibitory effect on appellants' free exercise of First Amendment freedoms.

This case presents the issue of freedom of speech and association in one of its most significant and sensitive aspects—the area of academic freedom. The importance of unimpeded thought in the right of exploration for teachers unhampered by state harassment far exceeds that of any other profession or vocation. The United States Supreme Court has fully recognized the special importance of this interest.

In *Sweezy v. New Hampshire,* 354 U. S. 234 (1957), four members of the Supreme Court held the view that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should under-estimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few if any, principles are accepted

as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students otherwise our civilization will stagnate and die." (*Sweezy, supra,* at p. 250.)

* * *

"We do not conceive of any circumstances wherein a state interest would justify infringement of rights in these fields." (*Sweezy, supra,* at 251.)

The *Sweezy* case recognizes therefore, the vital importance of academic liberty. The justices were in agreement that,

"* * * petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated * * *. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to treads." (*Sweezy, supra,* at pp. 249-250.)

Mr. Justice Frankfurter and Mr. Justice Harlan, in a concurring opinion, stated that,

"* * * the dependence of a free society [is] on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." (*Sweezy, supra,* at 262.)

In *Shelton v. Tucker,* 364 U. S. 479, 487, the Court quoting from the concurring opinion of Mr. Justice Frankfurter in *Weiman v. Updegraff,* stated:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the states to inter-

> fere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.' *Weiman v. Updegraff*, 344 U. S. 183, 195 concurring opinion."

While it is clear that the Supreme Court is now committed carefully to safeguarding academic freedom, the Court has on the other hand never suggested that a state may not lay down reasonable terms of employment for its teachers and professors. That which constitutes reasonableness in such a case, however, has been re-examined and modified, as the importance of academic freedom has received fuller judicial recognition, its opposing considerations necessarily have been forced to give way. See generally, Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law and Contemporary Problems 447 (1963).

1. *The statutes impose as conditions of public employment prohibitions of constitutionally protected behavior.*

We are met at the outset with the unlimited and indiscriminate breadth of the statutes and rules here under attack. The sweep of the statutes is measured by the requirement that no person shall be appointed to or retained in the public service who

"By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the Government of the United States, or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means;" (Civil Service Law, Section 105(1)(a))

or who

"Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;" (Civil Service Law, Section 105(1)(b))

and also by the fact that academic personnel can be removed

"* * * for the utterance of any treasonable or seditious word * * * or the doing of any treasonable or seditious act * * *" (New York Education Law, Section 3021)

and by reason of the fact that academic personnel can be removed

"* * * for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position." (New York Civil Service Law, Section 105(3))

where such words or acts are punishable by loss of employment and by imprisonment for not more than ten years or a fine of not more than $5,000.00 or both for anyone who

"prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence, or any unlawful means;" (New York Penal Law, Section 161(2))

"Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing

or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread, or advocate the propriety of the doctrines of criminal anarchy;" (New York Penal Law, Section 161(3))

"Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine." (New York Penal Law, Section 161(4)).

Included within the literally hundreds of proscriptions contained within the above paragraphs is conduct and language which the Supreme Court has often recognized in the past as constitutionally protected. As it stands, Section 161 of the Penal Law would prohibit a professor from distributing to his students copies of certain of the federalist papers or copies of the Declaration of Independence. Where one is prohibited from the utterance of any word of "Criminal Anarchy", he is prohibited from discussing in the most abstract manner, those political doctrines which are today opposed to ours; indeed, the Appellate Division of the New York Supreme Court has been of the opinion that the writings of Karl Marx fall within the condemnation of the Penal Law sections. See *In re Lithuanian Workers' Literature Soc.*, 196 App. Div. 262, 187 N. Y. Supp. 612 (2nd Dept. 1921). The section would also prohibit the carrying on a public street by a university professor of a copy of the Communist Manifesto; "* * * publicly displays any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *", Penal Law, Section 161(2). Furthermore, membership in groups which predict the overthrow of the United States Government by force or violence is proscribed; "* * * shall be overthrown * * *", New York Civil Service

Law, Section 105(1)(c). Additionally, teaching Marxist principles is forbidden since no one shall obtain or retain public employment who "* * * teaches the doctrine that the Government of the United States * * * should be overthrown or overturned by force * * *", New York Civil Service Law, Section 105(1)(a). Marxism as a doctrine espouses the notion that capitalistic governments should be overturned by force. To teach the doctrine is here under these statutes forbidden. New York Penal Law, Sections 160 and 161 are similarly objectionable with the added feature of making such conduct crimes.

In addition to forbidding innocent activity and belief, the statutes here under consideration prohibit public employment to one who "* * * voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine", Penal Law, Section 161(4). Thus phrased, the proviso is clearly repugnant to the United States Constitution. The provision would deprive a university professor of his employment merely for attending a meeting of one of the groups proscribed. Also, this provision bars one, on loss of employment, from attending a discussion which is directed toward political and social change through peaceful democratic methods merely because the group sponsoring such discussion is one which falls within the prohibition of the statute. As such, the statute falls squarely within the holding of *Dejonge v. Oregon*, 299 U. S. 353, and is clearly unconstitutional.

Also included within the prohibitions of the above sections is a college faculty member who

> "* * * edits * * * any book * * * containing * * * the doctrine that the Government of the United States or of any State or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine

contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"prints * * * any * * * document * * * containing * * * the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"* * * publishes * * * any * * * printed matter in any form containing * * * the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the duty * * * of adopting the doctrine contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"* * * issues * * * any book * * * containing * * * the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * necessity * * * of adopting the doctrine contained therein * * * " (Civil Service Law, Section 105(1)(b))

Or who

"* * * sells any book * * * containing * * * the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * * " (Civil Service Law, Section 105(1)(b))

Or who

"* * * issues * * * any book * * * teaching the doctrine that the Government of the United States * * * should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"By word of mouth or writing * * * deliberately * * * teaches the doctrine that the Government of the United States * * * should be overthrown * * * by force, violence or any unlawful means * * *" (Civil Service Law, Section 105 (1)(a))

Or who

"By word of mouth or writing wilfully and deliberately * * * advises * * * the doctrine that the Government of the United States * * * should be overthrown * * * by force * * *" (Civil Service Law, Section 105(1)(a))

Or who

"* * * knowingly circulates * * * any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161(2))

Or who

"* * * distributes * * * any * * * printed matter * * * teaching the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161(2))

Or who

"* * * edits * * * any book * * * advocating * * * the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161(2))

Or who

"* * * publicly displays any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161 (2)).

The above proscriptions, taken from the very language of the statutes themselves, indicate the unconstitutional reach of the enactments under consideration. The prohibitions reach not only distribution of proscribed doctrine *per se* (New York Penal Law, Sections 160, 161) but also distribution of the proscribed doctrine when coupled with

the distributing persons personal belief as to the "* * * duty, necessity or propriety of adopting the doctrine contained therein * * *" (New York Civil Service Law, Section 105(1)(b)).

Thus, New York bars from public employment not only those who do certain innocent acts, but those who believe in forbidden ideas and concepts as well.

Even more startling is the fact that a university professor can be barred from public employment if he does not write the article in question or participate in its preparation. This will be the case if he publishes, prints, edits, issues or sells, a document "containing" proscribed articles when he believes the doctrine enunciated ought to be accepted.

Also under the statute a professor who "publicly displays" a book to his students which either "contains" (without advocating) or teaches proscribed doctrine is guilty of a "seditious act". (New York Civil Service Law, Section 105(3); New York Penal Law, Section 161(2)).

Furthermore, "the doctrine' enunciated in the article, may not be of the type which could be considered to "advocate" the destruction of the government. This can be observed by the inclusion of the phrase "containing *or advocating*" in New York Civil Service Law, Section 105(1)(b).

Additionally, the professor is barred not for advocating the destruction of the United States Government as is apparently the case in New York Civil Service Law, Section 105(1)(c), but for "* * * advocating * * * the doctrine * * *" (New York Civil Service Law, Section 105(1)(b)) or "* * * teaching the doctrine that the Government of the United States * * * should be overthrown by force * * *"

(New York Civil Service Law, Section 105(1)(b)). Thus, the statutes in question reach those who teach these doctrines without themselves inciting others to attempt to commit any acts. It is, therefore, the dissemination and advocacy of doctrine as doctrine which is forbidden.

Additionally, the New York Legislature by coupling certain innocent activities with an individual's state of mind—"embraces the duty" (New York Civil Service Law, Section 105(1)(b))—has not saved but only further raised constitutional questions of a most serious order.

The Supreme Court of the United States has clearly indicated that an attempt to proscribe abstract doctrine or mere belief must fail; and that dictating beliefs as a condition of governmental employment must fail. In plain language, New York has made beliefs in certain forbidden concepts a ground of exclusion from the teaching profession of the State.

In *Torcaso v. Watkins,* 367 U. S. 488, the United States Supreme Court held that a state cannot compel a belief in the existence of God as a test for office in the State of Maryland. Let it be said that neither can the State of New York forbid beliefs of any type as a condition for employment of university professors and scholars. To punish such a person by refusing him employment in his chosen field merely for holding a belief is an invasion of the mind of a most fundamental nature. To attempt to forbid certain beliefs which enjoy little current favor is nothing more than state imposed thought control. A statute which conditions employment by forbidding beliefs is clearly beyond state action. Should members of the NAACP or the Minutemen of America, or the Ku Klux Klan be prohibited from teaching in the schools merely because of what they believe? Certainly there are some

areas of the country where these groups are considered a very great danger to the established order. A state cannot require that its teachers have closed minds on some subjects regardless of their conscience. There can be no rational relationship between forbidding beliefs and a person's fitness for teaching unless we indulge in the unwarranted assumption that beliefs will always emerge as acts. The above provisions go far beyond qualifications for employment, they constitute punishment. Only the naive will say that banishment from public employment as a university professor does not constitute punishment. But more importantly, a social order has begun its slow decline when it attempts to regulate the thoughts of its members. Philosophies and political notions are transient things, they shift and change and are reorientated. This is the view which must be taken by a legal system when confronted with legislation, often embodying the prejudices and passions of the many. There can be no legal justification for thought control.

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia v. Barnett,* 319 U. S. 624 at 642.

The District Court below attempted to save the statutes here under attack by ignoring the troublesome language contained therein and by focusing instead on the words "force and violence" in the statutes. Thus, the court stated in its opinion (Record, p. 292):

> "Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should 'be overthrown * * * by force' is a basis for adverse consequences under these sections."

It seems clear, therefore, that the District Court found that the statutes, administrative rules and procedures, involved in this lawsuit merely proscribe a designation for employment tightly keyed to knowing advocacy that the Government of the United States should be overthrown by force or violence and that the Feinberg Law merely implements this disqualification in the university system of the State. In reaching this conclusion, the District Court erred.

As indicated earlier in this brief, the proscriptions involved in this lawsuit run into the hundreds and many bear no true relation to force or violence. Each of the proscriptions must be considered separately as each can be separately applied. An unconstitutional enactment is not to be saved simply by lumping a multitude of prohibitions into one statutory paragraph. It is not possible to save these statutes by indicating that the "sense" of the enactment relates to force or violence. This is so because we deal here not with a single specific prohibition but with a multitude of independent activities each capable of being set out apart from the rest of the statute and capable in the process of being independently enforced. It should be remembered that the appellants involved here, as well as hundreds of educators in the New York State University system have been required to consent that *all* of these offensive statutes shall form a part of their employment and contract terms. Furthermore, this Court should note that linked with these statutes is a means of enforcement spelled out in the "Regents Rules of Subversive Activities" which provides for a systematic and continuous surveillance in which the public authorities are admonished to watch for a violation of "any of these provisions".

There can be little doubt that where statutes of such all encompassing breadth as these, are made part of the terms of a scholar's contract of employment at a state university,

and where such employment is conditioned upon acceptance of such terms, that the "ardor and fearlessness of scholars" will certainly be checked. In the light of these statutes, it is well to remember that "we need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory". *Weiman v. Updegraff*, 344 U. S. 183 at 192 (1952); see also *Shelton v. Tucker, supra,* (when conditions to public employment restrict First Amendment freedoms, it is no longer sufficient that they be merely 'not patently arbitrary or discriminatory', they must meet the standards of a full scale 'balancing' test). The statutes, administrative rules and regulations, in their breadth are unreasonable. As applied to faculty university personnel, they constitute and "* * * unwarranted inhibition upon the free spirit of teachers * * *" and have "* * * an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; * * *" making " * * * for caution and timidity in their associations * * *" *Weiman v. Updegraff*, 344 U. S. 183, 195. (concurring opinions).

2. *The statutes, administrative rules and procedures further intrude into constitutionally protected areas of speech and association for the reason that they impose, through conditions to employment, a broader proscription of speech than could be constitutionally imposed by means of a direct restriction in their (1) failure to distinguish between advocacy of abstract doctrine and advocacy that incites to action, and (2) in their failure to distinguish between active and passive membership in proscribed organizations.*

It will be observed from a close analysis of the statutes in question that aside from issues involving innocent con-

duct and speech which are clearly protected by the United States Constitution that the State of New York has forbidden other conduct and speech upon a lesser standard than do the Smith Act cases. Thus, for example, New York Civil Service Law, Section 105(1)(b) makes one ineligible for public employment who "* * * edits * * * any book * * * teaching the doctrine that the Government of the United States * * * should be overthrown by force * * * and who * * * teaches * * * the * * * propriety of adopting the doctrine contained therein * * *". Also, New York Penal Law, Section 161(1) makes one guilty of a seditious utterance who "by word of mouth or writing, advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence * * *".

These proscriptions must be compared with the admonition of this Court that "we held in Yates, and we reiterate now, that the * * * teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States,* 367 U. S. 291 at 297-298 (1961).

Furthermore, while it appears that the word or act must be done "wilfully and deliberately", New York Civil Service Law, Section 105(1)(a) or "knowingly", New York Penal Law, Section 161(2), neither Civil Service Law, Section 105(1)(2) or (3) or Education Law, Section 3021, or Penal Law, Section 160, or Section 161(1), (2), and (4), indicate that there must be an intent to bring about a substantive evil or intent to use or solicit the use of force or violence. (See New York Penal Law, Section 161(2), "* * * publicly display any book * * * containing * * * the doctrine that organized government should be overthrown

by force.") In other words, the statutes contain nothing beyond the prohibition of the expression or promotion of the expression of the doctrine itself. Thus the statutes impose punishment whether by civil, *e. g.,* loss of employment, or by criminal sanctions without regard to injury or the specific intent to cause injury. Of course, even a specific intent to cause injury without more, would not be enough under the standards imposed by this Court.

In *Yates v. United States,* 354 U. S. 298 (1957), this Court carefully marked off the boundaries of the First Amendment and in doing so, construed the Smith Act Section in such a way as to meet constitutional objections thereto. This Court stated at page 318:

> "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forceful overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not."

It is true that the *Yates* case was decided upon a statutory construction, not a holding of constitutional law, but in its own words, the Court was skirting the edges of "a constitutional danger zone * * * clearly marked". (*Yates, supra,* at 319). Thus, the court in *Yates* clearly distinguished between advocacy of forceful overthrow in itself and incitement of action to that end, a distinction nowhere evident in this complex.

Apart from the actual speech sections of this complex, it should be observed that in New York punishment is imposed for membership in proscribed groups which membership need not be "active", *Scales v. United States,* 367 U. S. 203, only "knowing", *Thompson v. Wallin,* 301 N. Y. 476 at 494.

The District Court below did not consider the legal issues raised by the broad standards of disqualification imposed by these statutes despite the fact that legal issues were fully briefed. Apparently the Court accepted the contention of the appellees that the Smith Act cases are not in point, at least with respect to the civil portions of this complex. It is submitted that the District Court erred. Counsel maintain that the Smith Act cases define the area of maximum reach which statutes can have when they admittedly infringe upon First Amendment freedoms. It is no argument to state that the standards imposed by the Smith Act cases apply only to those statutes where the activity would result in criminal prosecutions. The standards cannot be any less simply because the punishment imposed here is loss of public employment. See *e. g. Aptheker v. Secretary of State,* 378 U. S. 500 and *Elfbrandt v. Russell,* 34 U. S. L. W. 4347 (indicating that active membership in proscribed organizations with an intent to further the unlawful aims of the organization is the standard by which employment or travel may be denied).

To adhere to a standard less rigid than the Smith Act cases enormously expands the State's capacity for restraint and suppression of First Amendment freedoms. Academic discussion, attempts to persuade, along with knowing but inactive membership all fall within the bar of a state's power. To give a state such power in effect allows it to penalize all advocacy of legislatively prohibited doctrines, regardless of their immediacy to violence or their generation of public disorder. Thus, for the reasons set out above, the statutes are unconstitutional.

C. The statutes, administrative regulations and procedures, infringe upon freedom of expression in that they use terms which are vague, fluid and indefinite.

a. With respect to its various parts.

Section 3021 of the New York Education Law requires the removal of academic personnel "* * * for the utterance of any treasonable or seditious word * * *". Phrased thus broadly and loosely, it is on its face repugnant to the Federal Constitution. Its vagueness deprives appellants of due process and its proscriptions clearly act as an impermissible deterrent to First Amendment liberties. We should ask ourselves is "down" a seditious word? Is "down with the United States Government" a seditious phrase?

Justice Frankfurter, by way of dicta, has indicated clearly the problem which Section 3021 poses. Dissenting in *Adler v. Board of Education of the City of New York, supra,* at 506, he stated:

> "We are not told the meaning to be attributed to the words, 'treasonable or seditious' in § 3021 of the Education Law, though that is one of the two sections of preexisting law which the elaborate apparatus of the Feinberg Law is designed to enforce. In light of the experience under the Sedition Act of 1798, 1 Stat. 596, 'seditious' can hardly be deemed a self-defining term or word of art."

Subdivision (3) of Section 105 of the New York Civil Service Law contains language similar to Section 3021 and, therefore, is similarly questionable. Subdivision (3) requires the discharge of any civil servant "* * * for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts * * *". Unlike Section 3021, this subdivision states that "seditious" shall mean "criminal anarchy" as defined in the

Penal Law. These definitions, however, do not ameliorate the vagueness of the words purportedly defined. On the contrary, Section 105, paragraph 3, by equating "sedition" with "criminal anarchy" only further aggravates language already unconstitutionally vague. "Criminal anarchy" is defined in Sections 160 and 161 of the Penal Law; the range of prohibitions with respect to this section have already been explored.

To defend Sections 160 and 161 by referring to the case of *Gitlow v. New York,* 268 U. S. 652 (1925), is to overlook the present status of *Gitlow.* Justice Frankfurter, while acknowledging that *Gitlow* had never been explicitly overruled, stated nevertheless that "* * * it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision." *Dennis v. United States,* 341 U. S. 494 at p. 541 (1951).

The Court below, attempted to save the penal provisions of the complex with the simple declaration that the "looser language" of Section 161 was not before it.

Subdivision (3) of Section 105 of the New York Civil Service Law is captioned "Removal for Treasonable and Seditious Acts or Utterances" and provides:

> "A person in the Civil Service of the State or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason' as defined in the Penal Law; a seditious work or act shall mean 'criminal anarchy' as defined in the Penal Law."

Section 160 of the Penal Law provides:

> "Section 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by as-

sassination of the executive head or of any of the executive officials of the government, or by any unlawful means. *The advocacy of such doctrine either by word of mouth or writing is a felony.*" (Emphasis supplied).

Section 161 of the New York Penal Law is entitled "Advocacy of Criminal Anarchy". The section provides punishment for:

> "Any person who: By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,
>
> Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or
>
> Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or
>
> Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine."

It is clear that Sections 160 and 161 are intimately bound together. "The advocacy of such doctrine" is obviously defined in Section 161 and as such constitutes a part of the complex involved here and is incorporated into Civil Service Law, Section 105(3). There is no need to search for the definition of "advocacy". The State Legislature of New York has set out the definitions in Section

161. The serious constitutional questions raised by these definitions cannot be avoided merely by leaving out the operative sentence of Section 160 (See opinion of the Three Judge District Court, Record p. 259).

The irony involved in the District Court's attempt to save the statute is that by limiting the definition of criminal anarchy to that provided in Section 160 the District Court actually expanded rather than limited Civil Service Law, Section 105, Subdivision (3). This is the case since a definition cannot be considered in a vacuum. It can only be considered in the context of speech. Thus, the District Court failed to take account of the fact that subdivision (3) of Section 105 of the New York Civil Service Law prohibits the "utterance of any * * * seditious word or words". Of course, to utter is to speak. By refusing to include Section 161 as a part of the complex, the District Court thus expanded the range of prohibitions to include all words spoken which relate to the doctrine that organized government should be overthrown by force or violence, *except words of advocacy.* Thus, the District Court vastly expanded the area of prohibitions involved in this case. Counsel for the Attorney General of the State of New York and counsel for the State University of New York have apparently recognized this fact since at no proceedings involved in this case from its inception through all the oral arguments and briefs herein, have they denied that the language of Section 161 is included in the complex before this Court. Neither have they denied that a violation of that provision would result in dismissal proceedings under the complex as indeed they could not since the New York Court of Appeals has indicated that Sections 160 and 161 are to be construed together.

> "James Larkin, Benjamin Gitlow, C. E. Ruttenberg, and Isaac E. Ferguson, were indicted, tried and convicted of the crime of criminal anarchy *as defined by*

Sections 160 and 161 of the Penal Law * * *", *People v. Gitlow*, 234 N. Y. 132, at 135 (Emphasis supplied).

The District Court further erred in its holding that the vagueness of Section 3021 of the Education Law has been clarified. It cannot be declared that the references appended to the words "treasonable" and "seditious" in Section 105, paragraph 3 of the Civil Service Law are in some way applicable as well to Section 3021 of the Education Law. There exists no support for this view. Neither the Courts of New York nor its Legislature have construed, amended, or in any way clarified Section 3021 since the time of its enactment. While the New York Supreme Court has stated "* * * § 3021 of the Education Law and § 12-A (now 105) of the Civil Service Law must be given consideration in passing upon the validity of [Section 3022 of the Education Law]", *Thompson v. Wallin*, 196 Misc. 686, 93 N. Y. S. 2d 274, 281 (1949), rev'd. 276 App. Div. 463, 95 N. Y. S. 2d 784 (1950), aff'd. 301 N. Y. 476, 95 N. E. 2d 806, aff'd. *Sub Nom.*, 342 U. S. 485 (1952), it has never been suggested that Section 3021 and Section 105(3) must be construed together. Similarity of language alone cannot put statutory provisions *in pari materia*. Moreover, even if the sections in question were required to be construed together, it has been noted that the references in Section 105(3) to the Penal Law are no cure to its vagueness.

Certain of the offending portions of the complex are at least clear and unambiguous. One knows for example, whether or not one is a member of the Communist Party. It is another matter, however, to have uttered a seditious word and be barred from public employment and criminally prosecuted when a college professor "* * * justifies by word of mouth * * * the * * * unlawful * * * assaulting of any executive * * * of * * * any civilized nation having an

organized government * * * or any other crime with intent to * * * spread * * * the propriety of the doctrines of criminal anarchy * * *" New York Penal Law, Section 161(3). We are not told what is meant by a "civilized nation" having "organized government". Of course, political scientists have argued for years over the point at which a government becomes "organized". Furthermore, "justifies" embraces a multitude of acts so broad as to be limited only by the hearer's prejudices. The range of behavior proscribed by "* * * justifies * * * any other crime * * *" is so broad as to define comprehension. "Advises", "teaches", "necessity", "propriety", "doctrine", are concepts blurred in the charged emotions of today's world. Past history shows it is not only the ignorant who would drag all those who pursue social reform into the Communist camp but too often also judges, prosecutors, legislators, and candidates for all those offices.

Still another impermissible feature of the complex is the use of the phrase "helps to organize", Civil Service Law, Section 105(1)(c); New York Penal Law, Section 161(4). To be required to ascertain whether one has helped to organize is to surrender completely to hopeless confusion. It catches the assistant to the assistant.

The present suit complains, *inter alia,* of the breadth and vagueness of the requirement in Section 105(3) of the Civil Service Law that no academic employee utter "* * * any * * * seditious word or words" or engage in any "* * * seditious act or acts * * *." Moreover under the construction of the complex by the District Court below, seditious words or acts shall not include words of advocacy or conduct as defined by Section 161 of the Penal Law. It is submitted that the complex is unconstitutional under either construction, and that the District Court in attempting

to save the complex eliminated any possible guide to ascertainable conduct. What then qualifies as a seditious word or act?

The questions which Justice White found to be left open by the Washington Statute in *Baggett v. Bullitt*, 377 U. S. 360, are similarly left open by the statutes presently complained of. See *Baggett, supra*, at 366-73. Does a treasonable or seditious utterance "* * * reach support for communist candidates for office?" Does this language reach those who support the constitutional rights of the communist party or its members or anyone who supports a like cause? The breadth of the statutes involved makes it obvious that no answer can be given to these questions.

The Washington Statute prohibited the advocacy of alteration of government by revolution, while the New York Statute prohibits the mere advocacy of overturning government by any unlawful means. These proscriptions cannot be reconciled; the New York statute is equally as vague in this respect as the Washington Statute was found to be.

In *Cramp v. Board of Public Instruction*, 368 U. S. 278, the Supreme Court found unconstitutionally vague the requirement that a teacher not lend "* * * aid, support, advice, counsel or influence to the communist party". *Id.* at 279. Far more vague is the requirement presently complained of that no academic personnel engage in "treasonable or seditious acts." Both requirements would proscribe constitutionally protected conduct, yet the latter leaves far more room for argument as to the quantum and quality of the conduct which it proscribes.

It should be noted that the statutes in the present case, while proscribing advocacy of violent overthrow of state or federal government and membership in the Communist

Party, go far beyond this relatively definable behavior. As suggested in *Cramp v. Board of Public Instruction, supra,* at page 286, and in *Baggett v. Bullitt, supra,* at page 370, language less susceptible of objective understanding than this should be scrutinized closely.

It has been suggested that the mere use of such words as "Communist Party", "overthrow", "force", and "violence", in the statute will save it from the defects of vagueness. However, in *Baggett v. Bullitt, supra,* this Court held unconstitutionally vague a statute which contained such words as "advocates", "abets", "advises", "teaches", "overthrow", "destroy", "alter", "revolution", "force", and "violence".

Baggett makes clear that a statute which is overly broad and comprehensive will not be saved simply because such terms are used. Clearly the key to the *Baggett* and *Cramp* holdings is that undefined, indefinite and comprehensive terms cannot be said to take their substance from other terms which are "susceptible of objective measure".

The New York complex, like that of *Cramp* and the statute in *Baggett,* is also deficient in that:

> "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution, 368 U. S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath taker—teachers and public servants—to 'steer far wider of the unlawful zone', *Speiser v. Randall,* 357 U. S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps

> profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. *Smith v. California*, 361 U. S. 147; *Stromberg v. California*, 283 U. S. 359, 369. See also *Herndon v. Lowry*, 301 U. S. 242; *Thornhill v. Alabama*, 310 U. S. 88; and *Winters v. New York*, 333 U. S. 507". *Baggett, supra*, at pages 372-3.

This Court has continuously repeated the above quoted standards and principles when confronted with a variety of factual situations not necessarily similar to the case at bar. See *e. g., NAACP v. Button*, 371 U. S. 415. As such, they underscore the fact that they transcend factual patterns and are of fundamental significance where First Amendment freedoms are at stake. We here emphasize that profound constitutional questions involving basic First Amendment freedoms cannot be resolved by the use of simple formulae as has been suggested.

Compared to the language of this statutory complex the provisions involved in *Cramp* and *Baggett* were stark and rigid both in outline and detail. Yet it is the language of this complex which the State of New York has declared constitutes the employment terms of the academic personnel involved in this case. For a violation of any of these proscriptions, the party involved would be ineligible for continued employment and possibly criminally prosecuted.

It is no argument to state that the statutes can be saved because an element of scienter could be read into them. In *Weiman v. Updegraff*, 344 U. S. 183 (1952), the Court reviewed its decisions in *Adler v. Board of Education*, 342 U. S. 485; *Garner v. Board of Public Works*, 341 U. S. 716 (1951) and *Gerende v. Board of Supervisors*, 341 U. S. 56 (1951), concluding that a state loyalty statute would be upheld in any case where a requirement of scienter was made explicit in the statute. See *Morris, Baggett v. Bullett:*

Scienter and "Guiltless Knowing Behavior", 1 Law in Trans. Q. 185, 208 (1964). Presently, however, scienter, without more will not uphold a loosely worded academic loyalty statute and most certainly for our purposes a loosely worded statute imposed as employment conditions on university professors. Recognizing at once the need to preserve academic freedom, and the fact that permissible academic inquiry is deterred by a vague and indefinite statute regardless of how knowing the actor's behavior may be, the Court has recently ruled that a state loyalty statute, with or without scienter, is unconstitutional if its effect is to deter free inquiry. See *Baggett v. Bullitt, supra, Cramp v. Board of Public Instruction,* 368 U. S. 278 (1961). As was said in *Baggett, supra,* at page 368:

> "The susceptibility of the statutory language to require foreswearing of an undefined variety of 'Guiltless Knowing Behavior' is what the Court condemned in *Cramp.* This statute, like the one at issue in *Cramp,* is unconstitutionally vague."

It is plain that the rule against vagueness has special force where the uncertainty pertains to the right of political expression. This is true because uncertainty in this area operates as a prior restraint upon communications, the most noxious form.

In a series of cases, the Supreme Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at its meaning and to differ as to its applications. *Winters v. New York,* 333 U. S. 507, *Lanzetta v. New Jersey,* 306 U. S. 451, and the cases cited therein. The Supreme Court in *Smith v. California,* 361 U. S. 147, at page 151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser."

No one can deny that the sweeping breadth and scope of prohibited conduct with its threats of possible imprisonment as well as loss of employment, constitute the type of statutory scheme which will inhibit and deter the First Amendment freedoms of those to whom our society has need to give the freest rein of intellectual inquiry—university professors and scholars. It is not enough to say that criminal sanctions may be remote. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." (Chafee, Z., Freedom of Speech 466 (1941)). With respect to this area, the language of the Supreme Court in the case of *NAACP v. Button, supra,* is worth quoting *in extenso.*

> "But it does not follow that this Court now has only a clear cut task to decide whether the activities of the petitioner deemed unlawful by the Supreme Court of Appeals are constitutionally privileged. If the line drawn by the decree between the permitted and the prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. See *Smith v. California,* 361 U. S. 147, 151; *Winters v. New York,* 333 U. S. 507, 509-510, 517-518; *Herndon v. Lowry,* 301 U. S. 242; *Stromberg v. California,* 283 U. S. 359; *United States v. C. I. O.,* 335 U. S. 106, 142 (Rutledge, J., concurring). Furthermore, the instant decree may be invalid if it prohibits privileged ex-

ercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 U. S. 88, 97-98; *Winters v. New York, supra,* at 518-520. *cf. Staub v. City of Baxley,* 355 U. S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and over-breadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application.[14] *cf. Marcus v. Search Warrant,* 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *cf. Smith v. California, supra,* at 151-154; *Speiser v. Randall,* 357 U. S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut,* 310 U. S. 296, 311." *NAACP v. Button,* at pp. 432-3.

b. The statutory complex *per se* is vague.

The Trustees Certificates, either one of which all academic personnel prior to June 10, 1965 had to sign as a condition of their employment, incorporate by reference Article XVIII, Section 244 of the Rules of the Board of Regents. Both the Trustees Certificate and the Regents Rules were adopted pursuant to the authority given in Section 3022, paragraph 1 of the New York Education Law. The rules and the statutes in this proceeding still constitute the terms of employment for academic personnel by reason

of the resolutions adopted on June 10, 1965. The Regents Rules, in turn, incorporate by reference both Section 3021 of the New York Education Law and Section 12-A (now Section 105) of the New York Civil Service Law, the former applying originally to non-civil service academic personnel only (*i.e.*, those in the exempt class), and the latter originally to civil service employees. Presently, however, Section 105 of the Civil Service Law, due to its incorporation by reference into both Section 3022 of the Education Law and the Regents Rules, applies alike to both academic and civil service employees. Conversely, the language of Section 3021 of the Education Law has been added to Section 105, paragraph 3 of the Civil Service Law, with a further reference to the New York State Criminal Anarchy Statute. Thus, those employed in an academic capacity must abide by the terms of both the Regents Rules and Section 3021 of the Education Law. Section 3022 of the New York Education Law was enacted for the purpose of applying the terms of Section 105 of the Civil Service Law to the public schools and, by amendment in 1953, to universities.

As observed by Justice Frankfurter, this statutory scheme is a highly complicated one and, moreover, it is tied to a highly complicated scheme of enforcement. See *Adler v. Board of Education of the City of New York,* 342 U. S. 485, 500 (1952) (dissenting opinion). The many references to interrelated parts, and the prolex and profuse language used therein unquestionably results in a confused and vague understanding of the behavior intended to be proscribed. Therefore, we here attack not only the various parts of the scheme severally, but also the statutory complex *per se* as being so incapable of being understood as to constitute a denial of due process. When we combine this statutory complex with the means of enforcement of the

statutes spelled out in the "Regents Rules on Subversive Activity", we have the sort of "systematic and continuous surveillance" referred to as a dubious possibility by Mr. Justice Frankfurter in his opinion in *Adler v. Board of Education*, 342 U. S. at 507.

The statutes, administrative rules, and procedures, which constitute the terms of employment of the academic personnel involved herein, and for violation of which they are ineligible for continued public employment, are unreasonable, and should be stricken as unconstitutional.

In considering the foregoing arguments, we ask this Court to consider that the threat of criminal prosecution permeates and pervades this statutory scheme. Many of the same acts which will result in a loss of public employment are defined as criminal. While it might be argued that the danger of prosecution is limited, the Supreme Court has stated that First Amendment freedoms are delicate and vulnerable as well as supremely precious in our society and that the threat of sanctions may deter their exercise almost as potently as the actual application of them. *cf. Smith v. California*, 361 U. S. 147 at 151-154; *Speiser v. Randall*, 357 U. S. 513, 526. Furthermore, "It would be blinking reality not to acknowledge that there are some among us always ready to fix a communist label upon those whose ideas they violently oppose. Experience teaches that prosecutors, too, are human". *Cramp v. Florida*, 368 U. S. 278 at 286-287. In times such as these with the rapid growth of extreme right-wing organizations, it is not unrealistic to consider the threat of prosecution a serious one. In addition, university professors and scholars are extremely vulnerable when operating under such broad and indefinite prohibitions. Their function is to examine, to question, to dispute, to explore, unorthodox and unpopular

notions. Thus, they are most apt to cause the passions of the community to become aroused. In circumstances such as those they can, under the penal provisions of this complex, be placed at the mercy of unsympathetic judges and juries. There may not be much hesitancy in reaching a verdict that someone who is unpopular is also a subversive and therefore a criminal. The criminal-civil complex before us, while not grounded on perjury, has the same weaknesses inherent within it which caused Mr. Justice Frankfurter (dissenting as to vagueness) in *American Communications Association v. Douds,* 339 U. S. 382 to declare at page 420:

> "It does not meet the difficulty to suggest that the hazard of a prosecution for perjury is not great since the convictions for perjury must be founded on willful falsity. To suggest that a judge might not be justified in allowing a case to go to a jury, or that a jury would not be justified in convicting, or that, on the possible happening of these events, an Appellate Court would be compelled to reverse, or, finally, that resort could be had to this Court for a review on a petition for certiorari, affords safeguards too tenuous to neutralize the danger".

D. The statutes, administrative regulations and procedures infringe upon freedom of expression and association and are unconstitutional in that (1) there is no State interest shown which is impelling; (2) there is no relation shown between the information sought and a subject of compelling interest; (3) the State purpose could be more narrowly achieved by less drastic means.

It is essential to recognize the full extent to which the statutes under consideration deter and inhibit First Amendment freedoms. It is plain that New York bars from public employment not only those who do certain inoffensive and innocent acts but also those who believe in certain forbidden ideas and concepts as well. Furthermore, by use of

procedural devices which will be elaborated upon below, the State subjects its professors to the burdens and strains of justifying their political ideas or conduct, and exposes them to the impact of an aroused public opinion while at the same time reserving to itself sanctions of striking effectiveness in curtailing associations, opinions, and activities. All this at a time when developments have taken place in the community where the individual, by reason of greater economic dependence and other pressures to conform, has become far more vulnerable to the kind of sanctions wielded by the State.

In light of the foregoing, this Court must carefully analyze the complex here under attack in order to determine if it meets the minimal standards which the Supreme Court has set for legislation of this type. There is no doubt that when state legislation invades First Amendment freedoms that there must be a subordinating state interest which is impelling. *Sweezy v. New Hampshire,* 354 U. S. 234; *Gibson v. Florida,* 372 U. S. 539. Furthermore, there must also be a substantial relation between the freedom regulated and the state's subordinating interest, *Gibson v. Florida, supra,* at page 546. Additionally, the legislation must be narrowly drawn and go no further than necessary to vindicate the state's interest and finally the burden of demonstrating each of the above is upon the state convincingly to show, *Gibson v. Florida, supra.* While the above cases dealt with the validity of an investigation which intrudes upon constitutionally protected First Amendment freedoms, the principles which they enunciate are applicable here, since the state cannot condition public employment where First Amendment freedoms are involved upon lesser standards.

The State of New York will defend its exclusionary system with its broad incursions into protected freedoms on

the ground of the state's need in securing fit and competent teaching personnel free of the taint of disloyalty and subversion. The state, however, declaring its need, has demonstrated none. There has been no showing of need for legislation of this type affecting thousands of university personnel. The legislative findings which were the basis for the Feinberg Legislation in 1949 dealt primarily with the state's need to protect its children from those it considered disloyal and whom it found were infiltrating its public schools. Those findings cannot be extended to cover faculty personnel on a university level without distorting the entire concept of state need for this type of legislation. Furthermore, the statutory amendment which applied this legislation to university personnel was passed in 1953 (see N. Y. Laws 1953, Ch. 681), four years after the findings which prompted the original legislation. There has been no showing that state findings were made with regard to the above amendment and which were used as a basis for it. In view of the foregoing, how can it be said that the state has demonstrated an impelling need for the legislation which affects these appellants? Where has there been a showing that the danger to the state's university system is great by reason of the activities of certain individuals who advocate views which a majority believes to be contrary to the notions which underlie our democracy? There is no showing. However, if this Court were to make the unwarranted assumption that the legislative findings which underlay the enactment of the Feinberg Legislation in 1949 are sufficient to support the 1953 amendment, then it should consider that such findings are stale. There is no invasion of state legislative function by so doing unless any scheme can find harborage within the concept of legislative function. The findings which prompted the Feinberg Law were made sixteen years ago and it cannot be assumed that

the danger still exists merely because the legislature has not acted. Such inaction will be defended upon the ground that the legislature is the best judge of a continuing danger. But we submit that it is First Amendment freedoms we are dealing with and the remoteness of the findings is certainly an element which the Court should consider.

Even assuming a valid demonstrative need, it is still necessary for the state to show a substantial relation between the activity prohibited and the subject of impelling need. The prohibitions in this case are wholesale.

New York has used a blunderbuss approach proscribing inoffensive and innocent acts, "• • • publicly displays any book • • • containing • • •", New York Penal Law, Section 161(2) as well as ideas and concepts, "• • • embraces the duty • • • of adopting the doctrine contained therein • • •", New York Civil Service Law, Section 105(1) (b), all of which bear no true relation to a subject of compelling need.

It is plain that the legislation before us has not been narrowly drawn to vindicate the state's interest. It is overly broad and comprehensive cutting a swath in vague and fluid terms across protected and innocent freedoms in an attempt to meet an undemonstrated need. As such, it is unconstitutional.

If we assume *arguendo,* a legitimate state need, the state is still not free to subjugate liberties if its desired ends can alternatively be achieved in a manner which is less restrictive of First Amendment rights.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breadth of legislative abridgement must be viewed in the light

of less drastic means for achieving the same basic purpose'" *Shelton v. Tucker*, 364 U. S. 479, at 488.

In such instances, then, the Constitution requires that "the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied", *id.* at 520.

Thus, those who adhere to the "balance" theory of First Amendment liberties, once they have found a subordinating state interest, must then use a second weighing scale. They must choose the best of possible alternatives. As between methods that can be used to exclude those legitimately disqualified from the teaching profession, that one must be chosen which has the least effect upon, and which will most likely preserve First Amendment liberties.

Applying this concept to the case at bar, it is submitted that the complex here is unconstitutional in that the state's purpose could obviously be accomplished in a manner which does not involve a wholesale invasion of the First Amendment. The statutes are a jumble of vague, broad, indiscriminately worded provisions which severely impair First Amendment rights without enhancement of a legitimate state interest and without any evidence that there are not less restrictive means available to accomplish the basic state purpose. The end does not justify any means of achieving it. The exclusionary process cannot make unconstitutional demands upon the personnel; they cannot be required to forego the Bill of Rights for the privilege of receiving a paycheck.

E. With respect to appellant Starbuck.

The constitutional issues with respect to appellant Starbuck's dismissal are treated here separately as they raise

somewhat different issues. Appellant Starbuck was appointed pursuant to the New York Civil Service Law in a temporary capacity as indicated previously, but was dismissed without a hearing on June 18, 1964, for failing to answer the following question relating to past political beliefs and actions:

> "Have you ever advised or taught or were you ever a member of any society or group of persons who taught or advocated the doctrine that the government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

The inquiry made of Starbuck is invalid for many of the reasons which have been set out previously concerning the various provisions of the complex. However, it should be observed, that unlike those provisions, the device used is a completely retrospective query with regard to certain speech and membership in proscribed groups. Like many of the provisions of the complex it focuses on doctrine. For example:

> "Have you ever * * * taught * * * the doctrine that the Government of the United States or of any political subdivision thereof should be overthrown or overturned by force * * *".

And,

> "Have you ever advised * * * the doctrine that the Government of the United States or of any political subdivision thereof should be overthrown or overturned by force * * *".

However, unlike Section 105(3), New York Civil Service Law, membership in organizations which *advocated* or *taught* "the doctrine" that the Government of the United States or of any of its political subdivisions should be overthrown by force, is also inquired of.

It is conceded that a "yes" answer to the above inquiry would enmesh appellant Starbuck in the exclusionary me-

chanism of the statute with its operative presumptions, and it is clear that appellant Starbuck was certainly justified in refusing to answer a question whose vagueness could be construed to include numerous groups or international societies quite apart from the Communist Party which might, as one of their tenets, teach or have taught the proscribed doctrine. Apart from questions as to the scope of the word "doctrine", we are met with the question of the constitutionality of the remoteness of conduct inquired into.

It is submitted that the word "ever" and the completely retrospective query made of appellant Starbuck goes beyond the state's right of legitimate inquiry.

In a series of cases, decided by a closely divided court, the Supreme Court of the United States has upheld the power of the state to inquire into an employee's association with allegedly subversive organizations as relevant to the employee's qualifications and fitness for public employment. It has, for example, upheld the discharge of municipal employees who refused to take a statutory required disclaimer oath, *Garner v. Los Angeles,* 341 U. S. 716; and of a subway conductor who refused to answer questions relating to subversive associations under a statute which authorized discharge when reasonable grounds existed for the belief that the employees was of doubtful trust and reliability, *Lerner v. Casey,* 357 U. S. 468; and of a teacher who refused to answer similar questions, on the ground of "incompetency", *Beilan v. Board of Education,* 357 U. S. 399; and of a social worker for his refusal to answer such questions, under a statute which made refusal "insubordination", *Nelson v. Los Angeles,* 362 U. S. 1. These and other cases, however, indicate that there are constitutional limitations on the state's exercise of these powers. For example, a broad inquiry into other kinds of associations of a non-subversive character may not be made. *Sheldon*

v. Tucker, 364 U. S. 479. With respect to disclaimer oaths, the state may not indiscriminately require a disclaimer of innocent as well as knowing association, even with subversive organizations as a condition of employment. *Weiman v. Updegraff,* 344 U. S. 183. Nor may the disclaimer form be so vague that it is impossible to determine its meaning, so that it acts as an inhibition to free association of an innocent kind. *Cramp v. Florida,* 368 U. S. 278. Also the Court has indicated that in discharging an employee whether because he is found to be a subversive or because he refuses to sign a disclaimer or answer questions, the state must accord the employee procedural due process, *i.e.,* specification of charges and an opportunity to be heard. *Nostrand v. Little,* 362 U. S. 474. It follows, therefore, that while certain inquiries under specified conditions can be made, that academic freedom and other First Amendment freedoms cannot be destroyed or inhibited on the pretense of protecting the state from disloyalty.

Thus, it would be manifestly improper for the state to deny employment under a guise of alleged inquiry into qualifications where such inquiry itself invades constitutional rights. It is clear that the state does not have an absolute right of inquiry. In every instance of inquiry, the state must contend with restrictions placed upon it by the Fourteenth Amendment of the Constitution of the United States which applies to the people of the states those freedoms of speech and association embodied in the First Amendment.

The question as to whether such remote associations as are encompassed by the word "ever" can be inquired of teachers, has not been foreclosed by *Garner v. Los Angeles Board,* 341 U. S. 716. In that case, a disclaimer affidavit containing the word "ever" regarding membership in the Communist Party was upheld. The *Garner* case involved

municipal employees and the disclaimer affidavit was not so sweeping as is the one here before the Court. The affidavit there dealt only with membership. Furthermore, the oath requirement which was also upheld in that case was retrospective at most only five years.

An aspect of the *Garner* case which bears on the constitutional question before us is one that is often overlooked. The state will say that the inquiry here is merely into qualifications and that no determination of eligibility can be made prior to the answering of the question involved. The implication is that appellant Starbuck would not necessarily be discharged if he had answered the question in the affirmative. In *Garner*, the court stated at page 720:

> "Not before us is a question whether the city may determine an employee's disclosure of such political affiliation justifies his discharge."

In the present case, this Court is not confronted with the lack of information noted by the Supreme Court in *Garner*. It is plain what the results of an affirmative answer to the disclaimer question would be. In New York, affirmative disclosure of the information being elicited would result in "*prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or any city or civil division thereof". New York Civil Service Law, Section 105, New York Education Law, Section 3022(2).

The reason for this is that past membership in a subversive organization is "presumptive evidence that membership has continued in the absence of a showing that such membership has been terminated in good faith". Rules of the Board of Regents, Article XVIII, Section 244(2).

Thus, we are not concerned here with an initial inquiry leading to further investigation since it is clear that one

who answers the question affirmatively would have the heavy burden of bringing in substantial evidence in the very first instance. And it would not matter at what age or under what circumstances the improper activity had taken place. These are circumstances not contemplated in the *Garner* case. Every inquiry into past association is an encroachment upon rights granted by the First Amendment. Such admitted encroachments have been allowed by the Supreme Court on the theory that the interests of the State must be balanced against those of the individual. The rationale of the cases which have allowed inquiry into past associations of a public employee has been that such information was reasonably necessary to determine an employee's fitness. Can it be said that an inquiry back to a teacher's birth is necessary in order to determine his fitness? This is the latitude which the word "ever" allows. Furthermore, a heavy burden is placed on a teacher as previously mentioned, if at some time in the distant past he became a member of a group whose present day activities are proscribed. To place such a burden on a person while admittedly infringing on his constitutional rights of association and speech, cannot be accepted on the basis of an allegedly honest search into qualifications. The more remote the associations and speech looked to, the less persuasive the qualifications argument becomes.

The issue of the query to Starbuck is not controlled by *Nelson v. Los Angeles County*, 362 U. S. 1. In that case, the employee's discharge was predicated on his refusal to answer the question, "Are you a member of the Communist Party now?", *Nelson, supra*, at page 5. Neither is this issue controlled by *Lerner v. Casey*, 357 U. S. 468. In that case, Lerner refused to answer the question as to whether he was *then* a member of the Communist Party. *Lerner, supra*, at page 471. Neither is this issue controlled by *Konigsberg*

v. State Bar of California, 366 U. S. 36, or *In re: Anastaplo*, 366 U. S. 82, for the reason that in those cases the questioning was on the basis of initial inquiries which might lead to an opportunity to investigate the matter more thoroughly. It has been observed that in the present situation an affirmative answer to the query results in *prima facie* evidence of disqualification. The setting thus in which the question is asked in the present case is of a type which would of necessity severely inhibit First Amendment liberties.

Beilan v. Board of Education, 357 U. S. 399, does not control. In that case, the court upheld the dismissal of a teacher by a Pennsylvania School Board. The teacher had refused to confirm or refute information as to his activities eight years prior in certain allegedly subversive organizations. However, the Court pointed out at page 405:

> "Petitioner's refusal to answer was not based on the remoteness of his 1944 activities."

It is clear that the court felt that a substantial issue would have been raised if remoteness had been the basis of the teacher's refusal to answer. In that sense, the *Beilan* case foreshadowed the decision of this Court in the recent case of *DeGregory v. Attorney General of the State of New Hampshire*, 34 U. S. L. W. 4345. In the *DeGregory* case, the individual involved was sentenced to prison for contempt because of his refusal to answer questions concerning his alleged communist activities prior to 1957. Among the questions he refused to answer was this: "Have you ever been a member of the Communist Party?" *DeGregory, supra*, at page 4345. This Court, in reversing the contempt conviction held that there was no overriding state interest which would warrant intrusion into political and associational privacy where the information being sought was so stale as to be historical. Of course, the case before this

Court is not presented in the setting of an investigation relating to the law making function, and, the punishment for refusal to give the information in this case is not imprisonment but dismissal from employment. However, this Court has recognized in the past that the loss of one's employment can be punishment. *Cummings v. Missouri,* 71 U. S. 277 at page 320.

In fact, the denial of an opportunity to follow one's chosen profession in government service is most certainly, in any view, "punishment" of the severest form. The Supreme Court has recognized this principle, even in cases which were decided on other points of law,

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances depending on the causes of deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful advocation * * * may also, and often has been, imposed as punishment." *Cummings v. Missouri,* 71 U. S. 277 at 320.

Furthermore, the impact of such remote associations and speech inquired of coupled with the presumptions operative where an affirmative answer is given is substantial. We are concerned here with far more than "frankness and candor" as an initial inquiry leading to further investigation. The inquiry here and the answer demanded is not made to identify but to disqualify.

The tragic feature in cases and inquiries of this type is that those whose mission it is to overthrow the government of the United States will not hesitate to swear loyalty, while men of principle may find themselves the victims of an impersonal state machinery.

The use of the word "ever" and the inquiry made of Starbuck is unconstitutional.

Additionally, the manner in which the inquiry was presented to Starbuck, indicates that it is a unique exclusionary device. Any attempt to justify the question on the ground that it is merely an inquiry into qualifications must fail as the question cannot be affirmatively answered without the individual becoming involved in the mechanism of exclusion. Furthermore, the vague language forces one to decide on penalty of perjury whether he has engaged in the proscribed conduct. Thus the state has demanded of Starbuck as was demanded of the individuals in *Speiser v. Randall,* 357 U. S. 513, that he take the first step, execution of the question. Clearly requiring the execution of an answer to the question places the burden of persuasion and proof unto appellant Starbuck, and necessarily results in a deterrence of speech which the Constitution makes free. It presumes guilt and non-employability of all state employees, presuming either that they advocate the prohibited doctrines or that they are members of the prohibited organizations. If and only if appellant Starbuck comes forward and executes the proper answer will he become a member of the favored group, the group eligible for state employment. The question is asked of all alike—the loyal and the disloyal. In other words, the question presumes non-employability and then shifts onto Starbuck, on pain of prosecution for perjury, the task of determining his own eligibility. Such a procedure is prohibited to the State, *Speiser v. Randall, supra.*

II

The complex is defective in that it: (A) shifts the burden of proof: (B) creates an invalid presumption of law: (C) bars membership in groups which do not advocate forceful overthrow of the government: (D) conditions public employment upon the surrender of appellants' right to be free from self-incrimination: (E) does not afford certain of the appellants a hearing, all in violation of due profess of law, and the First Amendment.

A. The burden of proof is shifted.

The membership portion of the statutory scheme provides that no one shall obtain or retain public employment in the State of New York who "* * * becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means," Civil Service Law, Section 105 (1)(c). See also Penal Law, Section 161 (4).

In order that the Court may more easily comprehend the arguments to be presented below, it now becomes necessary to analyze those portions of this complex of which the State is most proud. Namely, Civil Service Law, Section 105 (2), Education Law, Section 3022 (2) and Rules of the Board of Regents, Article XVIII, Section 244(2).

In justification of the proscriptions imposed by the statutes here under consideration, the state will no doubt fondly point out that the previously named sections provide ample procedural protection to anyone unfortunate to have been enmeshed within the prohibitions of the statute. It will be shown below that the state has no reason to "point with pride" as the alleged procedural safeguards will not bear critical analysis. Moreover, it is sub-

mitted that there is no basis in law for upholding substantively an unconstitutional statute merely because it is framed with procedural due process.

The sections enumerated above provide in essence that the Board of Regents shall after inquiry and notice, make a listing of organizations which it finds to be subversive in that they violate the provisions of former Section 12-A of the Civil Service Law (now, all of Section 105). It is further provided that evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such listings shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Additionally, evidence of membership in such an organization prior to the said date, shall be presumptive evidence that membership has continued in the absence of a showing that such membership has been terminated in good faith. Furthermore, once a determination of ineligibility has been made, the party declared ineligible may have a hearing in the courts at which time the person declared ineligible shall have an opportunity for cross examination. Once the party involved has presented substantial evidence contrary to the presumptions mandated by the statute, the burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the evidence shall be upon the person making such order.

In discussing the procedural aspects of the statutes here involved, the Court of Appeals stated in *Thompson v. Wallin*, 301 N. Y. 476 at page 494:

> "Under subdivision 2 of the statute, no organization may be listed by the Board of Regents as subversive until 'after inquiry, and after such notice and hearing as may be appropriate'. The statute also makes it

clear that, when it appears that one who seeks to establish or retain employment in the state public school system knowingly holds membership in an organization named upon any listing for which subdivision 2 of § 3022 makes provision, proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment. But, as was said in *Potts v. Pardee*, 220 N. Y. 431, 433, 116 N. E. 78, 79, 8 A. L. R. 785: 'The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered, the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it.' Thus the phrase '*prima facie* evidence of disqualification', as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of § 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. Civil Service Law, 12-A, subd. (d). Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view, there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say that there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school systems of the state".

In *Lederman v. Board of Education*, 96 N. Y. S. 2d 466, App. Div. 2d Dept. 1950; aff'd 301 N. Y. 476, the Court stated at page 470:

"A finding pursuant to the statute (§ 3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under § 3022, subd. 2, Educa-

tion Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, moreover, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy. The disqualification referred to in § 12-A, subdivision (c), in respect to membership by an employee in a described organization, means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. Civil Service Law, § 12-A, subd. (d)."

In 1953, after the *Adler* decision, the Board of Regents of the State of New York, listed the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations. In 1958 the State Legislature adopted the findings of the Board of Regents and added a new paragraph to Section 105(3) of the New York Civil Service Law which declared that evidence of membership in the Communist Party of the United States or the State of New York shall be considered *prima facie* evidence of disqualification for employment to or retention in the service of the State of New York.

An examination of the procedure indicated previously shows that where an order of ineligibility issues against an individual on the grounds of his membership in a listed organization, it merely becomes necessary at a disciplinary hearing to establish the fact that the individual is a member of that organization. Once this is established, the individual is disqualified from public employment unless he can

present substantial evidence contradicting the facts presumed, *i.e.*, the nature of the organization or his knowledge thereof. Only if he is able to do so does the burden of proving ineligibility shift to the one issuing the order.

The obvious purpose and effect of the *prima facie* characteristic of the statute, together with the listing authority is to relieve the state from the burden of having to prove at any disciplinary hearing the major elements of its case. At any hearing only one fact need be established; membership. Having done so, the state can rest. The burden is then on the individual to rebut the presumptions created. If he is not able to do so, he is dismissed. While the state may legitimately create many presumptions, we submit that it goes beyond its limits constitutionally when it legislatively determines that the major elements of its case shall be presumed, especially in the situation here where First Amendment freedoms are at stake.

This Court must consider the fact that "evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith", Rules of the Board of Regents, Article XVIII, Section 244(2). All that need be established here is past membership, no matter how remote, even to the days of one's youth. Once such fact is established, the individual involved must come forward and show that such membership is not only terminated, but terminated in good faith. Once again, the major elements of the state's case are presumed. If one ignores semantics for substance, there has been an unconstitutional shifting of the burden of proof within the holding of *Speiser v. Randall*, 357 U. S. 513.

THE REMOTENESS OF THE FINDINGS.

It has been pointed out that in 1953 certain findings were made that the Communist Party of the United States and the Communist Party of the State of New York advocated the violent overthrow of the Government of the United States and its political subdivisions. Appellants emphasized that these findings were made thirteen years ago. Yet, the presumptions for membership still remain. No account is taken of the fact that in the ensuing years, the goals and ends of the organizations listed may have changed; yet on the strength of remote findings the burden is placed on an unfortunate individual who is found to be a member of these groups. *The state need not at any disciplinary hearing prove that the organizations listed presently advocate the violent overthrow of the government.* The state need only show that the individual involved is a knowing member of the group. This is so, since under the Regents' listings, the state would be able to avoid independent proof as to the nature of the organizations. Thus, the individual involved would be faced with the onerous burden of rebutting the presumptions created. It cannot be assumed that the listed organizations continue to advocate violent overthrow thirteen years after they were listed. Counsel maintain that casting the burden of disproving such advocacy on the individual involved not only violates due process of law under the *Speiser* rationale, but is invalid as a severe deterrent upon First Amendment freedoms of association of the appellants involved here.

When we consider these added elements and the severe repercussions which will follow from dismissal, then *Speiser* assumes even more significance.

In *Speiser*, the Supreme Court struck down a California oath which infringed upon freedom of expression and which

did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer", *Speiser, supra,* at 529. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure". The differences between the situation in *Speiser* and the case at bar are more apparent than real. The basic holding of *Speiser* is that when First Amendment freedoms are at stake, the burden of proof cannot be shifted to the individual. The state will tell us that the burden of persuasion in the whole case is always on the one bringing the charges. But statutory language cannot alter fact. The fact is that the major elements of the state's case are initially presumed. Only when the individual comes forward and rebuts the presumptions does the burden shift. He is guilty until he substanially shows he is not. Thus the statutes assume the guilt of an individual and assess his punishment conditionally. The rationale of *Speiser* is broad enough to cover the case at bar. *Speiser* turned on the vital importance of First Amendment freedoms and it would be remarkable if the Supreme Court were to allow that decision to become a shell by upholding systems which presume all major elements of a state's case.

B. An invalid presumption of law is created.

There is further vice in the procedure which has been set out by the State of New York. To discover it we must explore the nature of the hearing which will occur whenever an order of ineligibility issues.

It has been shown through an examination of the statutory procedure involved here as well as the interpretation of the New York courts that at any hearing, the individual

involved would have to overcome certain presumptions. However, if a professor admits that he is a member of one of the organizations which has been listed by the Board of Regents, he is thereupon automatically disqualified. As long as the presumptions remain, there can be under the language of the statute, no shifting of the burden onto the person who issued the order of ineligibility. In taking this approach, it will be noted that we do not here go into the quantum and quality of the proof. We merely analyze the statute as it stands on its face and as it has been construed by the state courts in order to ascertain how it works. Viewed in the light of how it actually works, the statute is clearly unconstitutional. It is unconstitutional for the reason that it creates an invalid presumption of law, it presumes that one who is a member of a certain organization is in agreement with its aims and goals. The statute and the constructions placed on the statute by the courts fail to take account of the fact that there can be such a thing as *innocent* knowing membership.

A professor may have joined the group to study it. Indeed, he might even agree with some of its aims while disavowing others, he might be "active" in the sense of taking part in those activities which he deems to have social significance while not taking part in other activity repugnant to his principles. He may have joined and was working within the group in order to reorientate its goals and methods. However, factors such as these under the statutes as construed by the courts of the State of New York (*Thompson v. Wallin, supra, Lederman v. Board of Education, supra*), are irrelevant, since the presumptions apply to such individuals as well as those who actually advocate violent overthrow. Thus, innocent knowing members and guilty members are penalized in the same manner.

All membership is deemed guilty membership by reason of the fact that at any hearing the only issue involved is the nature of the organization and the employee's knowledge of its ends and goals. Without benefit of trial, members of the proscribed organization are branded and stigmatized with the illegal aims of the group. It is settled; nothing further need be shown except that the individual is a knowing member of the group. And for such membership, the scholar or teacher involved, or indeed, any member of the Civil Service of the State of New York, is barred from employment in the service of the state. This is guilt by association with a vengeance.

The absurdity of such a situation can be found in examples of everyday life. All Republicans did not subscribe to the party's platform in 1964. All Democrats are not social welfare enthusiasts. Neither do all members of an ethnic group share the features of those who would caricature them.

In *Schneiderman v. United States*, 320 U. S. 118, the court stated at page 136,

> "* * * under our traditions, beliefs are personal and not a matter of mere association, and * * * men in adhering to a political party or other organization, notoriously do not subscribe unqualifiedly to all its platforms or asserted principles."

In *United States v. Brown*, 381 U. S. 437, the court, in discussing this principle, declared at page 456:

> "Just last term, in *Aptheker v. Secretary of State*, 378 U. S. 500, we held § 6 of the Subversive Activities Control Act to violate the constitution because it 'too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that § 6 inflicted its deprivation upon all members of communist organizations without regard to whether there existed any demonstrable relationship between the

characteristics of the person involved and the evil congress sought to eliminate. *id.* at 509-511."

In such a case, the fact presumed, ineligibility for public employment, does not rationally follow from the fact found: membership. Because innocent knowing membership is proscribed and, indeed, is irrelevant at any hearing, the statutes are unconstitutional.

The statutory procedures involved in this case would be defective even if it were assumed that innocent knowing membership would be a complete defense in a dismissal proceeding. We reiterate that it is not as the statutes have been construed. However, assuming such a defense were permissible, the result would be that in any dismissal proceedings, the individual involved would have to come forward and prove that in fact, his knowing membership was innocent.

This is the case since as stated previously, implicit in the entire statutory complex and in the hearing procedure is the assumption that mere membership is guilty membership.

Under this interpretation, the state's position is an admission the statutes assume the guilt of the individual involved and require him to come forward and prove that his knowing membership is innocent. This in itself indicates that the complex unconstitutionally shifts the burden of proof. See *Speiser v. Randall,* 357 U. S. 513.

In defense of this system, the state has declared that the presumptions are rebuttable and that the employee involved can rebut the presumptions with "substantial evidence". However, appellants ask this Court to reflect upon the difficulties of proving the negative. How does a university professor establish that he does not advocate vio-

lent overthrow of the government, or indeed, that the organization of which he is a member does not so advocate. This is his real burden since the advocacy of the organization has been established and since his advocacy of violent overthrow is presumed from membership. While matters of proof are generally left to the state courts, counsel submit that this Court can certainly consider such problems within the entire context of this lawsuit. These statutes, like those involved in *Cummings v. Missouri*, 71 U. S. 277, assume the guilt of the individual and assess the punishment conditionally. Thus, the statutory scheme raises an issue of fundamental significance.

The grave defect in any system which assumes an individual's guilt, is the danger that an innocent individual will not be able to bring in "substantial evidence" of his own lack of wrongdoing. It is not inconceivable that a university professor who becomes a member of a proscribed group (and in good faith accepts the proposition that he "may edit communist literature, may distribute communist literature, may even take part in communist sponsored activities or meetings", as the appellees have indicated) might have an extremely difficult time proving that his knowing membership was innocent. *Adler v. Board of Education*, 342 U. S. 485, held that an assumption of guilt does not violate due process of law where the "generality of experience" *Adler, supra,* at 495, indicates that from the fact found there is a rational relationship to the fact presumed. *Adler,* does not control on this point in the present case, since in addition to due process, we are concerned here with First Amendment rights of association. Moreover, *Adler* was decided before the Communist Party of the United States and the Communist Party of the State of New York were found to be proscribed organizations. Thus the effect of the presumption on First Amendment

freedoms of association was not so clearly defined as it is in the case at bar. Where freedom of association is at stake, we urge this Court to consider more than logic, since it has been observed that the life of the law is more than logic, it's experience and experience not only teaches that " * * * men in adhering to a political party or other organization, notoriously do not subscribe unqualifiedly to all its platforms or asserted principles", *Schneiderman, supra,* at page 136, but also that loss of employmen,t to a great many men, is considered a calamity of the first magnitude. Experience teaches, and the record in this case amply shows (Record, p. 18) that even men of courage will restrict their associations when confronted with a complex of the type before this Court.

The presumptions which the state has created will, of course, deter academic personnel and others at the State University of New York from associating themselves with any of the groups in question. This is so in view of the harsh economic consequences which would accrue to an individual who was found to be a member of the proscribed groups and who was unable to surmount the difficulty of proving his loyalty to the United States. Thus, academic freedom is seriously denied these appellants as well as others situated throughout the State University system of the State of New York. Counsel will not attempt to redefine the concept of academic freedom. Many attempts to define the concept have been made and

> "Although all of these definitions are different in phraseology and although each has its own variation of emphasis, they are all essentially the same in content. Collectively, they define academic freedom in terms of study, research, opinion, discussion, expression, publication, speech, teaching, writing and communication. To one familiar with constitutional law but who has never heard of academic freedom, these terms would instantly fall within a familiar framework, the

great and indispensable freedom which the First Amendment protects against abridgement by Congress, and which is considered so fundamental to a system of liberty and justice that it is included in the due process clause of the Fourteenth Amendment and thus made a limitation on the power of the states. Indeed, academic freedom as so defined seems to fall so naturally and readily and logically within the ambit of constitutionally protected speech and communication that it would be surprising, in fact, if academic freedom had not been brought within the scope of the First and Fourteenth Amendments.[12]'' Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 Law & Cont. Prob., at pp. 451-452.

Of course, in the context of an academic community, the protection of this bundle of First Amendment rights which is termed academic freedom, mandates that a university professor may indulge in these First Amendment freedoms without fear of state or institutional censor or discipline.

These statutes and the presumptions which they create will inhibit and deter the appellants and those of our society from joining the proscribed organizations who are in the best position to study them, namely academic personnel. Thus, academic freedom is seriously interfered with in this case. Indeed, if the organizations listed presently advocate the violent overthrow of the government, there are serious implications resulting from a policy which deters those from becoming members who would wish to change the organizations' ends and goals and reorientate them in their methods. The deterrence of this type of innocent knowing membership in the manner affected by the statutes is a matter of profound significance.

The appellees defend the presumptions which the state has created for membership in certain groups upon the strength of this Court's holding in the case of *Adler v. Board of Education,* 342 U. S. 485. As indicated earlier,

Adler did not consider the effect of the presumptions in the context of academic freedom embodied in the First Amendment rights of university personnel, and with the evolving principle of this Court that those devices which shift the burden of proof upon an individual in cases where First Amendment freedoms are at stake, are unconstitutional.

Appellants ask this Court to declare the sane and sensible rule that in any dismissal proceeding against a university professor, the state must not only prove that the organization involved has characteristics which are deemed improper, but that the individual *personally* has the characteristics deemed offensive rather than assuming these initially for membership.

It is only by forging such a rule, that academic freedom and First Amendment rights can be preserved.

C. Membership in groups which do not advocate forceful overthrow of the government is barred.

A striking feature of this complex is the fact that membership in groups which do not advocate forceful overthrow of the government is presumptive evidence of disqualification for appointment to or retention in the public service in the State of New York. This is the case because the Rules of the Board of Regents provides that:

> "* * * the Board of Regents will issue a list * * * of organizations which the Board finds to be subversive in that they * * * embrace the doctrine that the Government of the United States * * * shall be overthrown or overturned by force * * * or that they * * * embrace the * * * propriety of adopting any such doctrine * * *" Article XVIII, Section 244 (2).

This must be compared to Civil Service Law, Section 105(c) which proscribes membership in a group "* * * which * * * advocates that the Government of the United States * * * shall be overthrown by force or violence * * *".

It is apparent that the state is empowered by virtue of the Rules of the Board of Regents to proscribe membership in a larger assortment of groups than would be possible if only Civil Service Law, Section 105 (1) (c) were available.

Thus, phrased, the Rules create a presumption of disqualification for membership in groups which merely believe in the proposition that the Government of the United States shall be overturned by force. Once more, the presumption is invalid since the fact presumed does not rationally follow from the fact found.

When we consider that the Rules require a report each year on each teacher as to evidence of violation of the statutory complex, Rules of the Board of Regents, Article XVIII, Section 244(1)(b), such all encompassing authority cannot lightly be brushed aside. The Regents Rules are unconstitutional. *DeJonge v. Oregon*, 299 U. S. 353.

D. Appellants are forced to choose between possible self-incrimination or public employment.

Certain aspects of the case at bar deal with queries and disclaimers with respect to activities which the state has defined as "subversive". These activities have further been characterized felonies by New York Penal Law, Sections 160 and 161. See also, 18 U. S. C. 2385. Appellants are not asked if they have ever been *convicted* of engaging in these activities. They are asked if they have ever *committed* these acts and this is so under both the former and the new procedures. Thus, appellants are required either to incriminate themselves or suffer loss of employment. The fact that a hearing is provided when an affirmative answer is given does not relieve the danger since quite apart from the difficulty of overcoming statutory presumptions is the fact that a prosecutor would certainly not be bound by the

results of a hearing. Thus an affirmative answer would provide a "link in the chain needed in a prosecution." *Blau v. U. S.*, 340 U. S. 159 at p. 161.

The truly significant factor involved in this case is that appellants will lose their employment rights even if they choose to exercise their constitutional rights to be free from self-incrimination. (Which also now includes the Federal Right, *Malloy v. Hogan*, 378 U. S. 1.). This is so in view of the fact that this Court's decision in *Slochower v. Board of Higher Education*, 350 U. S. 551 has been severely impaired by the rather sophisticated reasoning of subsequent court decisions, see *e. g. Beilan v. Board of Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Nelson v. Los Angeles*, 362 U. S. 1.

It is submitted that these decisions have nullified a basic right of all public employees and in effect placed them in a position where they must choose between their jobs and their constitutional rights. This Court is requested to re-establish the principle that no disability can be levied upon a public employee who takes advantage of rights basic to our form of government. The complex conditions public employment upon the surrender of a fundamental constitutional right and is therefore, unconstitutional.

E. The complex does not afford certain of the Plaintiffs a hearing.

(1) The new procedures.

On June 10, 1965, six days before the oral arguments in this case, the Board of Trustees of the State University of New York adopted two resolutions which declared that it would be no longer state policy to require as a condition of employment the execution of the Trustees Certificates; new

procedures for appointments were substituted. Appellants contend that while the form has changed, the substance is the same. In fact, the new procedures have the same vice which is common to the statutes involved here, namely, overbreadth. The new procedures provide that Section 105 of the Civil Service Law and Section 3022 of the Education Law and the Rules of the Board of Regents and also Section 3021 of the Education Law, are part of the terms of employment for any university teacher or scholar. This is quite clear when we note the fact that "Before any initial appointment shall hereafter be made to any position * * * in the professional service of the university * * * the officer authorized to make such appointment * * * shall send or give to the prospective appointee a statement prepared by the president concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents." Resolution No. 65-100, Section 3. The new procedures provide that "* * * in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, [he] shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules". Furthermore, "Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." Resolutions, *supra*, Section 3 (Appendix F).

Additionally, the Resolutions provide that anyone employed prior to the effective date of the resolution shall not be deemed ineligible for employment "solely" by rea-

son of his failure to sign the certificates required by the resolution adopted in 1956.

Thus, refusal to sign the certificate is no longer the sole basis of disqualification, but merely evidence of such. This change in emphasis does not defeat the constitutional questions raised by the certificates since, in addition to providing that certain offensive statutes are part of a professor's contract terms, the certificates provide also a manner of inquiry which is unconstitutional. Appellants here do not merely complain of the fact of disqualification for refusal to execute the certificates (now reduced to evidence of disqualification); they complain also of the broad scope of inquiry which is attempted by use of this device. Thus, the First Amendment questions raised by the certificates remain intact whether disqualification follows from a refusal to sign or not. Therefore, we ask this Court to declare the certificates unconstitutional along with the statutes, administrative rules and procedures here involved.

It should be emphasized that the new procedures provide that certain offensive statutes should be brought to the attention of a prospective teacher "*Before* any initial appointment shall hereafter be made * * *", Resolutions, *supra*, Section 3. When viewed in this manner, the exclusionary features of the complex involved here is readily apparent. A conscientious teacher when confronted with the network of interlocking, ill defined statutes with their broad prohibitions on First Amendment freedoms must decide whether he should refuse appointment or risk his career on a chance remark or by knowing conduct included but not defined in the complex.

This is an unconscionable burden to place before a prospective employee. Under the new procedures, there can be

no pretense that the statutes serve an informational purpose. They are clearly exclusionary and as such unconstitutional.

(2) The lack of a hearing.

Under the statutes of the State of New York, the new procedures, the Rules of the Board of Regents and the Board of Trustees, academic personnel accepted for a term have no right to a formal hearing in respect to non-renewal of their terms.

In Article XVIII, Section 244 of the Rules of the Board of Regents, subdivision (1) (e), the Board of Regents has declared that:

> "In proceedings against persons serving under contract and not under the provisions of the tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal."

Thus, the plaintiffs presently still employed at the State University will have no right to a hearing in the event they are dismissed. This is so despite the fact of Civil Service Law Section 105(2) since under the new procedures, "Refusal of a candidate to answer any question relevant to such inquiry * * * shall be sufficient ground to refuse to make or recommend appointment", Resolutions, *supra*, Section 3. Under this procedure, the appointment would be refused on grounds that the candidate had blocked an inquiry into his qualifications rather than as a disqualification under the complex. Thus, no hearing is afforded.

Additionally, with respect to appellant Starbuck, the state has taken the position that temporary state employees who are discharged for failure to subscribe an answer to the civil service question relating to subversive activities are not entitled to a hearing. Thus, right of all appellants here to a hearing is clearly in issue.

If there were no possible explanation or defense for a failure to give the information requested, then it might be said that a hearing would be unnecessary because such refusal to give the requested information would inevitably result in a conclusion of unfitness. However, there are many reasons why a professor or state employee might not want to answer which in no way would reflect on his loyalty or fitness for the job. Thus an opportunity to explain could lift the cloud of suspicion which a refusal to answer would generate. The Supreme Court has recognized the vital importance of a hearing in situations of this type.

In *Slochower v. Board of Education*, 350 U. S. 551 (1956), the issue revolved around the New York City Charter which provided for the dismissal from employment of any employee who utilized his privilege against self-incrimination to avoid answering a question relating to his conduct. The Charter provided that the dismissal was to be automatic without right to notice, charges, or hearing. Slochower, an assistant professor at Brooklyn College, a public institution, exercised his right against self-incrimination with respect to former membership in the Communist Party before a committee of the U. S. Senate. He was summarily discharged. The United States Supreme Court held that the discharge violated both substantive and procedural due process. In speaking of the procedural aspect the Court stated at page 559:

> "We hold that the summary dismissal of appellant violates due process of law."

While the substantive ground in *Slochower* has been chiseled away, the procedural ground remains intact. Indeed, the Court's concern with lack of procedural safeguards seems steadily to have increased. This can be seen in the instances where the Court has felt obligated to com-

ment upon the question even where the issue had not been raised by the parties.

In *Nelson v. Los Angeles County*, 362 U. S. 1 (1959), Globe, a municipal employee, was discharged from public employment for refusing to answer certain questions concerning subversion before a subcommittee of the House Un-American Activities Committee. A statute of the State of California made it the duty of any public employee to give such testimony. Since he was a temporary employee, Globe was denied a hearing on his discharge on the ground that he was not entitled to a hearing under the civil service rules of the county. Commenting on the procedural aspect of the case, the Court stated at page 8:

> "But petitioner here raises no such point, and clearly asserts that 'whether or not petitioner Globe was accorded a hearing is not the issue here[5]'."

In footnote 5, the Court states:

> "Nor does petitioner make any attack on the failure of California's statute to afford temporary employees such as he an opportunity to explain his failure to answer questions. It will be noted that permanent employees are granted such a privilege."

The clear inference in the *Nelson* case is that the Court would have considered the procedural question, had it been raised.

In *Nostrand v. Little*, 362 U. S. 474 (1960), two professors at the University of Washington brought an action challenging the validity of a state statute which required all public employees to subscribe to an oath that they were not subversive persons or members of the Communist Party or any subversive organizations within the meaning of the statute. Refusal to subscribe to the oath was made grounds for immediate termination of employment. The Supreme Court of the State of Washington upheld the constitutional-

ity of the statute. However, the United States Supreme Court remanded the case to the Washington Court for a determination as to whether state employees who refused to sign the oath would be entitled to a hearing. The Court used the following language at page 475:

> "One of the claims is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. The Supreme Court of Washington did not pass on this point. The Attorney General suggests in his brief that prior to any decision thereon here, 'the Supreme Court of Washington should be first given the opportunity to consider and pass upon' it."

On remand, it was stated in the Washington Supreme Court:

> "Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the Act, it is violative of due process." *Nostrand v. Little,* 361 P. 2d 551, 567 (1961).

The Court found a hearing would be required.

An appeal was again taken to the United States Supreme Court which, in a *per curiam* decision, dismissed the case for want of a substantial federal question. *Nostrand v. Little,* 368 U. S. 436 (1962).

Justice Douglas, dissenting, stated at page 436:

> "The disposition that the Court makes of the case resolves one of the questions presented by the appeal, *viz.,* that appellants are entitled to a hearing before they can be discharged for refusing to take the oath."

Justice Douglas would have considered the substantive aspects of the case as well.

It is clear from the cases that a teacher has a right to a hearing before discharge from employment where his discharge has been predicated upon his refusal to answer questions concerning alleged subversive activities. The rationale

for such a right is no doubt based upon the fact of a recognition by the United States Supreme Court of the public reaction to a dismissal from employment where questions of subversion are raised.

As was stated in *Baggett v. Bullitt*, 215 F. Supp. 439 at 452:

> "Although discharge of a state employee for failing to fulfill a condition of employment by signing the loyalty oath carries no necessary inference of disloyalty to the employee it would be ostrich-like to ignore the practical realities of a public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status. The severe impact of such a discharge upon an employee whose refusal may be motivated by considerations unrelated to disloyalty, invokes the protection of due process with compelling force."

With such a rationale it is unlikely that the United States Supreme Court would distinguish between tenured and non-tenured teachers.

Additionally, the State has denied Appellant Keyishian, any hearing the "exigencies" might have warranted by simply allowing his term appointment to end and then refusing to renew his appointment (the result—a dismissal from employment). Counsel submit that the utilization of this procedure would nullify any hearing rights of the appellants here as well as hundreds of employees in similar circumstances throughout the state university system.

It is submitted that under the circumstances of the case at bar that the right to a hearing extends to situations where there is a refusal to renew term Appointments. The right cannot be destroyed by a change in form.

The State of New York has taken the position that Starbuck is not entitled to a hearing. Under the procedures in-

volved, the other plaintiffs are not entitled to a hearing also. Therefore, the statutes, administrative regulations and procedures are unconstitutional.

III

The complex is a bill of attainder.

Appellants submit that the statutory scheme here under attack is a bill of attainder. The complex inflicts punishment without a judicial trial, *Cummings v. Missouri,* 71 U. S. 277, 323, and is beyond the power of the New York Legislature to enact, Article I, Section 10, United States Constitution. There can be no doubt that loss of employment at a university professorial level is punishment of the severest form. When one considers the years invested in acquiring the knowledge and skill necessary to teach on a university level, it is readily apparent that the loss of so important an opportunity is a severe blow. It must be remembered that many university teachers have a skill which is not readily marketable in any other area except that of teaching. When this is coupled with the rapid assimilation of private universities into an ever growing public university, loss of an opportunity to teach at such university amounts practically to an inability to follow one's profession. While the Supreme Court left open the question as to whether or not a dismissal from state employment can constitute "punishment" in *Garner, supra,* 341 U. S. 716 at 721, it has in earlier cases indicated that the range of penalties which can be considered in bill of attainder cases is quite large. Thus the Court stated in *Cummings, supra,* at page 320:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determin-

ing this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful advocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also and often has been, imposed as punishment."

Furthermore, the case of *United States v. Brown,* 381 U. S. 437 has now laid to rest the historically incorrect doctrine that bills of attainder must be retrospective.

"It would be archaic to limit the definition of 'punishment' to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive * * *

Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution." *United States v. Brown, supra,* at p. 458.

With these principles in mind, we next set out the significant portion of the complex with which we are here dealing as to this question. New York Civil Service Law, Section 105(1)(c) provides that no one shall obtain or be retained in public employment who:

" * * * becomes a member of any * * * group of persons which * * * advocates that the Government of the United States * * * or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means.

For the purposes of this section, membership in the Communist Party of the United States of America or the Communist Party of the State of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

In *United States v. Lovett,* 328 U. S. 303, the court stated at pp. 315-316:

"* * * legislative acts, no matter what their form, that apply either to named individuals or to easily ascer-

tainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

An analysis of the New York Statute set out above shows that there can be no pretense that the state was merely legislating with respect to general characteristics only. The Legislature has gone further than that. Having determined that certain characteristics are offensive, it has then proceeded to legislatively determine the persons who possess the offensive characteristics and who, therefore, cannot obtain or retain public employment. It is precisely this vice which the framers of the Constitution sought to avoid. The basic separation of legislative, executive and judicial functions and the whole system of checks and balances was devised to prevent concentration of power with its attended abuse. The Legislature, having taken the initiative in raising the question, enacted the standard which it then proceeded to apply. The procedure is clearly unconstitutional.

It is no argument to say that the state has merely created a rule of evidence with respect to membership in certain groups which the individual involved can rebut. The fact of the matter is that under the system as set up by the state, members of the Communist Party of the United States of America and the Communist Party of the State of New York are presumed guilty and disqualified from public employment unless they can first remove the guilt.

The Court below, in holding the complex not to be a bill of attainder, placed particular reliance upon the fact that the proscription was not based on an original determination by the State Legislature of the aims of the Communist Party but rather was based upon the findings of the Board of Regents which, after extensive hearings, listed the two organizations under Section 3022 of the New York

State Education Law (Record, pp. 285-286). Apart from the very serious questions as to whether an administrative body in its factfinding capacity is fulfilling the obligations of a "judicial trial" with respect to issues raised in bill of attainder cases, the Court's reasoning below ignores the fact that the Board of Regents listed the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations *in 1953*. A crucial constitutional factor involved here is that the State Legislature took cognizance of the listing by the Board of Regents *in 1958* and elevated the findings to the stature of statutory law. (New York Civil Service Law, Section 105(3).)

It is clear from the preamble to the amendment incorporating the reference to the two parties that the purpose of the reference was to bring Section 105 into harmony with the determination of the Board of Regents under Section 3022. New York Session Law, C. 503, Section 1 (Record, p. 299). An examination of that preamble indicates that the Legislature considered nothing other than the fact of the listing by the Board of Regents.

It seems clear, therefore, that the Legislature of the State of New York in 1958 made an original determination that the Communist Party of the United States and the Communist Party of the State of New York were organizations which fell within the prohibitions of the complex involved here. The Legislature must have found, that is, as of 1958 at least, that the organizations listed by the Board of Regents in 1953 and their members, *continued to possess the characteristics which had led to the original listing.* Thus, we had a "trial by Legislature", *United States v. Brown*, 381 U. S. 437 at 442.

It is true as the District Court stated below that:

> "The Legislature, in the first instance—in enacting § 3022 of the Education Law—did nothing more than,

> in the language of Brown, 381 U. S. at 450, 'set forth a generally applicable rule' as to the characteristics of organizations, membership in which should be evidence of disqualification." (Record, p. 287.)

However, the District Court neglected to point out that the Legislature not only set forth the generally applicable rule but applied it as well in 1958. This is what the bill of attainder clause of the Constitution precisely forbids a Legislature to do, a fact clearly recognized by this Court in *Communist Party v. Subversive Activities Control Board,* 367 U. S. 1, where it stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations, but designated activities", 367 U. S. at 84-85.

The cases involving a State's power to legislate qualifications for a certain vocation and the rationale sustaining them are not applicable to the present situation before the Court since

> "There is nothing objectionable about the legislative establishment of appropriate qualifications for an office or vocation. In establishing qualifications, the Legislature spells out the affirmative qualities which are implied in the activity admission to which is restricted.[28] These qualifications do not exclude any designated person or class of persons; all are eligible to acquire the qualifications. The establishment of disabilities is another matter. Here the Legislature does not confine itself to reciting the requisite virtues which serve as qualifications; it specifies a characteristic which it declares to constitute a disqualification. Even here, however, the legislative action is not necessarily censorial or penal. When the Legislature declares that persons suffering from communicable diseases shall not be teachers, or that epileptics shall not drive automobiles, it is not passing judgment on those excluded. Another example is afforded by statutes which impose disabilities upon persons occupying a given position

or status because admitting them to the activity in question would expose them to a temptation to which many people would succumb. Public servants have been excluded by law from business transactions related to their official positions,[29] and from political activities;[30] railroads are forbidden by the commodities clause to haul the products of their own mines or factories,[31] certain shippers are forbidden to act as freight forwarders;[32] elaborate restrictions hedge in officers and employees of banks[33] and investment companies,[34] the directors of other concerns,[35] trustees under trust indentures,[36] and some other persons who act in a judiciary capacity. Although these disqualifications are established in terms of anticipated fault of character, there has been no legislative judgment of the particular persons. The Legislature relies upon common knowledge, that temptation leads in some cases to misconduct. Its judgment is in terms of general psychology. It is discharging the proper legislative function of establishing general rules of conduct, not the judicial function of appraising the faults of individuals.

We have a very different situation when the Legislature inquires into the character of the persons disqualified.[37] Here the disqualification results from a legislative judgment that the proscribed persons possess a characteristic not found in people in general. It rests, not upon general psychology, but upon evidence. It is a determination, judicial in nature, of culpability or blameworthiness." *Legislative Disqualifications as Bills of Attainder,* Wormuth, 4 Vanderbilt, L. Rev. 608-610 (1951).

In other words, the complex before this Court is designed to reach the person, not the calling.

The Court below stressed the fact that the disqualification was only *prima facie.* In other words, the Court indicated that an act is not a bill of attainder if it merely assumes the guilt of an individual rather than declaring it. An argument of this type was rejected by the Supreme Court in *Cummings v. Missouri,* 71 U. S. 277. In the *Cum-*

mings case, the United States Supreme Court held unconstitutional as a bill of attainder a requirement of the Constitution of the State of Missouri that individuals, in order to practice their professions, must subscribe to an oath that they had not engaged in certain designated activities.

The Court stated at pages 324-325:

> "If the clauses of the Second Article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty or should be held guilty, of having been in armed hostility to the United States, or having entered that state to avoid being enrolled or drafted into the military service of the United States and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the federal constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and thus be deprived, provided they did not, by a day designated, do certain specified acts, they would no less be within the inhibition of the Federal Constitution.
>
> • • •
>
> The results which would follow, from the clauses of the character mentioned, do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is affected

> with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows."

Thus this Court recognized almost one hundred years ago the dangers involved in a system which assumes the guilt and assesses the punishment conditionally, a danger not appreciated by the District Court below (which Court also relied in part on *Adler v. Board of Education*, 342 U. S. 485, despite the fact that the organizations were statutorily proscribed in 1958, long after the *Adler* decision).

The fact that a person can come in if he possesses substantial evidence and purge himself of the guilt cannot save this enactment from its serious constitutional defects. One may be innocent and still not be able to present "substantial evidence" of such innocence. Cummings could have signed a disclaimer oath and been eligible to practice his vocation, a procedure not quite so difficult as bringing in substantial evidence. However, the court in *Cummings*, recognized that the legislature in assuming guilt, is performing the same function of the judiciary in declaring it.

Could the New York Legislature, on the basis of facts found five years before, by an administrative body, declare that all members of the American Civil Liberties Union or of the Conservative Party of the State of New York are *prima facie* ineligible for public employment? Could the New York Legislature, on the basis of such findings and declarations require the affected individuals to come in and prove their innocence?

If the legislature is free to do this, then the concept of a *judicial* trial fades to insignificance, and the constitutional

prohibition against the bill of attainder becomes meaningless. Indeed,

> "Of what avail will be the prohibition if it can be avoided by changing a few forms?"
>
> • • •
>
> "You cannot imagine an instance of oppression, that the Constitution was designed to prevent, which may not be affected by this means." Argument for Mr. Cummings, *Cummings, supra,* at pp. 288-289.

The complex is a bill of attainder, *Cummings v. Missouri,* 71 U. S. 277; *Ex parte Garland,* 71 U. S. 333; *United States v. Lovett,* 328 U. S. 303; *United States v. Brown,* 381 U. S. 437.

IV

The complex is a prohibited *ex post facto* enactment which deters First Amendment freedoms.

A law is *ex post facto* if it punishes a citizen for an act which, when done, was in violation of no existing law, *Calder v. Bull,* 3 U. S. 386, 388; or if it alters the legal rules of evidence and receives less, or different, testimony than the law required at the time of the commission of the events, in order to convict the offender, *Calder v. Bull, supra,* page 390. Although Mr. Justice Chase in *Calder,* confined this *ex post facto* requirement in terms of criminal conduct, it is now clear that legislation which is essentially punitive cannot escape censor merely because it is cast in civil form, *Cummings v. Missouri,* 71 U. S. 277; *Ex Parte Garland,* 71 U. S. 333. Thus the test under both a bill of attainder and *ex post facto* provision is whether a legislative enactment levies "punishment" in some constitutional sense. It is clear that the Supreme Court has acknowledged that the loss of one's employment or ability to pursue his

vocation is indeed punishment since a statute depriving a person "of any rights, civil, or political, previously enjoyed may be punishment * * *", *Cummings v. Missouri, supra,* at 320. It has previously been mentioned that the statutory scheme in New York is essentially exclusive and not designed merely to elicit information. Information as to past activity in subversive groups brings into play the exclusionary mechanism of the statutes and the application of legislatively determined presumptions. It cannot be denied that the presumptions once operative present a formidable barrier to continuing employment. Past membership in proscribed groups is presumed to have continued unless termination of such membership in good faith can be shown. Clearly, to burden an employee with such a presumption for an act remote in the past, which act may have taken place prior to the enactment of the legislation is to punish that individual for innocent past acts. Indeed, such membership may have been in the 1930's when the Communist Party, for example, was just another political party, see *Cramp v. Florida,* 368 U. S. 278 at 286. To allow the projecting back of present anxieties and fears to acts which in the past were innocent presents a real danger to our liberties. The creation of the presumption here is punishment since the consequences of the presumption are substantial, as have been elaborated elsewhere in this brief. Further, the impact of this *ex post facto* enactment on First Amendment freedoms is considerable. The vice in this complex is that it creates a disability for conduct which has already taken place. To sanction such a principle leaves no speech or association of the present protected. Thus, a real element of deterence is observed. While it seems that no statute has been declared unconstitutional specifically because of its retrospective effect on freedoms of association and expression (but see *Weiman v. Updegraff,* 344

U. S. 183, 193 (1952), Black, J., concurring), the court seems to have avoided the delicate issues involved by using due process of law as a basis upon which to strike down legislation with *ex post facto* elements. See *e.g., Weiman v. Updegraff, supra,* at 191.

When considering this question, we ask this Court to take note of the fact that there is a distinction between legislation where the *ex post facto* elements create a substantial disability as in our case with the creation of presumptions and legislation where the *ex post facto* elements require compulsory revelation without specific consequences as in many employee dismissal cases. The first situation, with its officially imposed disadvantages is truly *ex post facto,* while the second, equally offensive, has its greatest impact in the area of First Amendment freedoms.

The District Court below, relying on the Supreme Court decision in *Garner v. Los Angeles Board,* 241 U. S. 716, dismissed the *ex post facto* question with the statement that:

> "The proscription of their conduct preceeded the conduct itself, so that the *ex post facto* clause does not apply" (Record, p. 284).

But the appellants here are not asked if they have engaged in proscribed activity since 1953. They are asked if they have "ever" been members of proscribed groups. An affirmative answer brings into play the presumption that they are still members and appellants are burdened with the responsibility of going forward and showing that such membership has been terminated in good faith. A failure to adequately do so results in a dismissal from public employment on the grounds of subversion as listed in Civil Service Law, Section 105. This indeed, is a high price to pay for membership which may have occurred years before

1953. It is this aspect of the case which raises the *ex post facto* issue. We deal here with more than a presumption of continuance. We deal with punishment for an act lawful when it occurred.

V

The statutes, and rules, certificates and questionnaires herein complained of are invalid insofar as they deal with matters preempted by existing federal legislation.

A large area of the complex before this court deals with activity directed towards the overthrow of the Government of the United States. For example, Civil Service Law, Section 105 makes one ineligible for public employment who:

> "* * * teaches the doctrine that the Government of the United States * * * should be overthrown * * * by force * * *"

Or who

> "prints, * * * any book * * * containing * * * the doctrine that the Government of the United States * * * should be overthrown * * * by * * * any unlawful means and who * * * embraces the duty * * * of adopting the doctrine contained therein * * *"

Or who

> "* * * helps to organize or becomes a member of any * * * group of persons which * * * advocates that the Government of the United States * * * shall be overthrown by force * * *".

Furthermore, "membership in the Communist Party of the United States of America * * * shall constitute *prima facie* evidence of disqualification * * *".

Additionally, the Regents Rules, New York Education Law, Sections 3021 and 3022 as well as Penal Law Sections 160 and 161 contain a great many references to activities

directed towards the Government of the United States and all "organized government".

In *Pennsylvania v. Nelson,* 350 U. S. 497, this Court held at p. 499:

> "* * * that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct."

Of course, the decision did not "* * * limit the right of the state to protect itself at any time against sabotage or attempted violence of all kinds[8]." *Pennsylvania supra* at p. 500, and neither did it affect the right of a state to investigate such activity directed *against itself Uphaus v. Wyman,* 360 U. S. 72.

However, the State under the complex at bar and by the procedures which it has utilized has gone beyond activity directed towards itself and imposed disabilities for activity which is properly the province of federal concern. Therefore, appellants maintain (See paragraph 49th of Complaint, Record p. 13) that the complex is unconstitutional insofar as it imposes punishment for conduct directed against the United States.

VI

The Doctrine of Abstention is not applicable to the case at bar.

Two cases recently decided by the United States Supreme Court have laid to rest any application of the abstention doctrine to the case at bar, *Baggett v. Bullitt,* 377 U. S. 360; *Dombrowski v. Pfister,* 380 U. S. 479.

These cases embody the principle that abstention will not be utilized where the vagueness of a state statute may interfere with first amendment freedoms. As this court has stated:

> "We also cannot ignore that abstention operates to require piecemeal adjudication in many courts * * * thereby delaying ultimate adjudication on the merits for an undue length of time * * * a result quite costly where the vagueness of a state's statute may inhibit the exercise of First Amendment freedoms." *Baggett, Supra,* at pp. 378-9.

> "Other considerations also militate against abstention here. Construction of this oath in the state court, abstractly and without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association * * * would not only hold little hope of eliminating the issue of vagueness but also would very likely pose other constitutional issues for decision, a result not serving the abstention justifying end of avoiding constitutional adjudication * * *" *Baggett, Supra,* at P. 378.

Appellants cannot be expected to consent that the statutes and administrative rules involved in this case are part of their contract terms based on the expectation that the courts will ultimately justify any statements they may make. This type of adjudication, "* * * affords safeguards too tenuous to neutralize the danger." *American Communications v. Douds,* 339 U. S. 382 at P. 420 (Frankfurter, J. dissenting as to vagueness).

The appellees have claimed that a state employee may teach communist theory, may write in defense of communism or may edit communist literature among other things. The language of the statutory scheme in this case does not sustain their contention, and university professors are certainly justified in their fears that a chance remark included

but not defined in the complex could have disastrous consequences on their careers. This is so especially in light of the fact that recently in another context a case was carried to the Court of Appeals of the State of New York with the sole view towards preventing a known member of the Communist Party merely from presenting a public address at the university. See *Egan v. Moore,* 14 N. Y. 2d 775, 199 N. E. 2d 842 (1964).

When we consider the large area of proscribed activities embraced by the language of this complex, it can be observed that those engaged in teaching activities in the State of New York will find it impossible to know when some action, knowingly or willfully taken, will be construed to be an act falling within the prohibitions of the complex. Such uncertainty plainly fails to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know where the standards imposed will draw the line between the allowable and the forbidden. Thus, appellants are denied reasonable advance notice of the circumscribed areas *involved* and are restricted and inhibited in the area of constitutionally protected freedoms. Those inhibitions cannot be interpreted away. The statutes here are so ill-defined and complex that a state court could not reach an acceptable limiting construction short of the piecemeal adjudicaiton considered to be so harmful to First Amendment Liberties in *Baggett.*

Therefore, it is submitted, that the case at bar is not one for abstention.

Conclusion

The statutory scheme involved here is highly unique and complex. The constitutional issues involved are those which are continually rising in an age when international distrust and fear have become a way of life. See *Baggett v. Bullitt*, 377 U. S. 360, at p. 366. The state will indicate that the Government's purpose in enacting and enforcing these statutes is the elimination of those tainted with disloyality from the school system of the state. If we assume *arguendo*, that such a legitimate state need exists in the present circumstances, this purpose should not be achieved at so unbelievable a cost in liberty and principle.

It is submitted that the elimination of these statutes will in no way interfere with the state's goal of obtaining fit and competent teachers nor will it prevent the imposition of honest and legitimate qualifications for the teaching profession. Men have struggled for centuries to establish and preserve the delicate freedoms with which we are here concerned. These freedoms cannot be preserved where a public authority can demand of an individual that he make a choice between his constitutional liberties and his economic well-being. It is only too evident that confronted with such a decision, most men, reluctant though they may be, will choose to feed their families rather than make a stand. There were hundreds at the University of Buffalo who were opposed to the certificates, laws, and administrative procedures in question. Only five had the courage to stand against economic coercion. This is not to say that the stature of those who opposed the laws, but who in the end consented that they should be a part of their contract terms, should in any way be diminished. They acted from an impulse profoundly basic in any society—the impulse to preserve and maintain the economic status of their families.

The very fact that men can be forced to a choice in such a manner is reason enough for this court to hold unconstitutional the complex before it.

Respectfully submitted,

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STATUTES, ADMINISTRATIVE RULES AND CERTIFICATES INVOLVED

APPENDIX A

Civil Service Law Provisions Involved

SUBDIVISION 1 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Ineligibility of persons advocating overthrow of government by force or unlawful means," and provides:

"No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall

constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

SUBDIVISION 2 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had," and provides:

"Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibilty based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismisssal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

SUBDIVISION 3 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Removal for treasonable or seditious acts or utterances," and provides:

"A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law.'

APPENDIX B

Education Law Provisions Involved

SECTION 3021, NEW YORK EDUCATION LAW, is captioned "Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances," and provides:

> "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

SECTION 3022, NEW YORK EDUCATION LAW, is captioned, "Elimination of subversive persons from the public school system," and provides:

> "1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.
>
> 2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force,

violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

APPENDIX C

Rules of the Board of Regents

ARTICLE XVIII, SECTION 244, RULES OF THE BOARD OF REGENTS (Adopted July 15, 1949), is captioned, "Subversive Activities", and provides:

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory pro-

* Now section 105.

visions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any

unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by the presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the num-

* Now section 105.

ber of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

APPENDIX D

Penal Law Sections Involved

SECTIONS 160 and 161 of the NEW YORK PENAL LAW provide:

"SECTION 160. Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"SECTION 161. Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

APPENDIX E

Feinberg Certificates

"A"

STATE UNIVERSITY OF NEW YORK AT BUFFALO

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

....

Date **Signature**

"B"

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof can not be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled "Regents Rules on Subversive Activities" together with the instructions set forth above and understand that these rules and regulations as presented to me, as well as the laws cited therein, except for the Education Commissioner's memorandum, are part of the terms of my employment. I further certify that I am not now a member of the Communist Party of the State of New York or of the United States, and that if I have ever been a member of the Communist Party of the State of New York or of the United States, I have communicated that fact to the President of the State University of New York.

..... Date ..... Signature

APPENDIX F

Resolutions of the Board of Trustees of the State University of New York

Resolved that Resolution 65-100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56-98 adopted on October 11, 1956, incorporated into the Policies of the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded,* and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be suffi-

cient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on that date.

Resolved that any person presently employed or heretofore employed by the University who has failed to sign the certificate required by the Procedure on New Academic Appointments adopted on October 11, 1956, shall not be deemed disqualified or ineligible solely by reason of such failure, for appointment or reappointment in the professional service of the University in the manner provided in new Section 3 of Title B of Article XI of the Policies of the Board of Trustees as adopted by resolution this day; and

Further Resolved that any person presently employed by the University shall not be deemed ineligible or disqualified for continuance in his employment during the prescribed term thereof, nor be subject to charges of misconduct, solely by reason of such failure, provided he is found qualified for such continuance by the Chief Administrative officer of the institution at which he is employed in accordance with the procedures prescribed in said new Section 3 of Title B of Article XI of the Policies of the Board of Trustees.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, ET AL., *Appellants*

VS.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, ET AL.

Appeal from the United States District Court for the Western District of New York

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

The American Association of University Professors appears *amicus*, with consent of all parties, in support of the position advanced by appellants.

INTEREST OF AMICUS

The American Association of University Professors is the national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. It has 975 chapters and over 80,000 members in such institutions; it is estimated that such membership constitutes approximately 30% of total full time faculty in accredited institutions of higher learning.

The Association is a joint sponsor, with the Association of American Colleges (the "AAC"), of the 1940 *Statement of Principles on Academic Freedom and Tenure.* This Statement, which has been endorsed by two-score leading professional and educational organizations, seeks to recognize the obligation of the academic community to formulate and apply substantive standards of rights and responsibilities as they relate to academic freedom and its exercise, and the procedural techniques and safeguards for the enforcement of such responsibilities and the protection of such rights.[1] In general, the AAUP has worked both inde-

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[1] The *Statement*, with a list of endorsing organizations, is set forth in the Appendix, together with an implementing 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, also jointly formulated and sponsored by AAC and AAUP. For a description of the processes under these statements, their background, and the special role of the Association, see Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 Law & Contemp. Prob. 431, especially 438-440 (1963). See also the annual reports of the Association's Committee A on Academic Freedom and Tenure, usually printed in the summer issue of the *AAUP Bulletin*. For examples of recent reports, based on full academic investigation, of cases under the Statements in which "loyalty" and "subversive" or related types of conduct were in issue, see those on Allen University and Benedict College, 46 A.A.U.P. Bull. 87 (1960), Alabama State College, 47 id. 303

pendently and in cooperation with colleges and universities and with other organizations in seeking the formulation, recognition, and observance of principles and practices indispensable to the sound operation of our colleges and universities in all its aspects.

The interest of the Association in the instant case derives in part from the fact that it involves statutes and related administrative requirements which represent state action directed specifically to, and in the judgment of the Association in derogation of, basic constitutional rights and related protective safeguards of members of the teaching profession.[2]

(1961), Sam Houston State Teachers College, 49 id. 44 (1963), University of Arkansas, 49 id. 344 (1963) (this case is the sequel of *Shelton* v. *Tucker*, 364 U.S. 479 (1960), discussed *infra*), the University of South Florida, 50 id. 44 (1964), Lincoln College (Illinois), 50 id. 244 (1964), and Wayne State College (Nebraska), 50 id. 347 (1964). All except Lincoln College involved in one way or another state legislative or administrative action.

To be noted is that many cases of violation are never the subject of a formal report, because the faculty involved may prefer not to pursue the matter publicly. Likewise, where review by the Association of dismissals or other adverse action against faculty indicates such action was properly taken, such cases would by their very nature not lead to formal investigation or to public reports.

The Fuchs article referred to *supra* is one in a symposium on academic freedom which treats at various points the issues presented by the instant case. See particularly Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law & Contemp. Prob. 447; Morris, *Academic Freedom and Loyalty Oaths*, id. 487; Emerson and Haber, *Academic Freedom of the Faculty Member as Citizen*, id. 525; and Joughin, *Academic Due Process*, id. 573.

[2] These issues are of concern as they relate to faculty who teach in public colleges and universities; they are becoming of increasingly greater significance with the growing community dependence on such institutions for higher education and other community needs.

As indicated by the facts of the instant case—the conversion of a private into a public institution—these requirements may also

The preservation and enjoyment of these rights and safeguards are, of course, of fundamental concern for their own sake to faculty, as they are to other citizens. Of much greater concern, however, to the academic community is that these rights and the protections they provide are essential to the integrity of the academic function and for an environment that permits the teacher to seek, transmit, and expand the boundaries of knowledge. Experience has made it altogether too clear that academic freedom and the substantial societal objectives and purposes it serves, are particularly subject to disruptive intrusion and interference—and its own subversion—through "loyalty" oaths, tests, and requirements as exemplified in state statutes and administrative action. This special vulnerability has already been recognized or referred to in various recent decisions and opinions of this Court (e.g. the repressive effect upon the free search and exposition of truth resulting from the very presence of such statutes, their

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have direct implications for faculty in private colleges. Some statutes, as in Massachusetts (Gen. Laws, c. 71, s. 30A), specifically apply to private as well as to public institutions; and there have been examples of state pressure on private schools. See, e.g. *Academic Freedom and Tenure: Allen University and Benedict College,* 46 A.A.U.P. Bull. 87 (1960), where such pressure was based on the power of the state with respect to teacher certification; in this case faculty were dismissed because of their views and activities in behalf of racial integration and alleged Communist affiliation. The case is discussed in [Fuchs,] *The Association and the Desegregation Controversy,* 48 A.A.U.P. Bull. 167, 168-169 (1962).

Further, teachers in private as well as public colleges and universities must, if they are to retain a full sense of freedom of opportunity for professional advancement or mobility in general, act in appreciation of the growing importance of the state supported institution in higher education. Also involved for them are appointments to advisory or other Governmental commissions or posts. See in this connection the outstanding statement of Professor Bentley Glass on *Test Oaths,* 46 A.A.U.P. Bull. 290 (1960), relating to an appointment to the Maryland State Radiation Control Advisory Board.

extensiveness and variety, and the often openly stated threat of their misuse.[3] It derives further from the expansion in many instances, as indicated by the facts in at least one recent case before the Court, of the concept and scope of "loyalty" and "subversion" so as to relate them to regard or respect for local community attitudes and mores.[4]

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[3] These cases are discussed in the body of the brief. The manner in which "loyalty" and "subversive" provisions and administrative action may operate *in terrorem* has been discussed and analysed in a number of writings, see e.g. Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. Bull. 753, 756, 760, 772-784 (1955), and especially Morris, *Academic Freedom and Loyalty Oaths*, 28 Law & Contemp. Prob. 487, particularly 496-502 (1963). The footnote treatment in the Morris article identifies much of the significant literature on the topic. See also his companion article, *The University of Washington Loyalty Oath Case*, 50 A.A.U.P. Bull. 221 (1964).

[4] *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The statute in this case, which required annual filing of affidavits as to associational membership and contributions, was shortly followed by one barring employment in public schools and colleges of members of the National Association for the Advancement of Colored People. The preamble of this act set forth a finding of the Special Education Committee of the Arkansas Legislative Council that the NAACP was a captive of the international Communist conspiracy. See Arkansas Statutes Annotated, Section 12-2335-38 (1959 Supplement), *Carr* v. *Young*, 106 Ark. 139, 331 S.W. 701 (1960), and *Shelton* v. *McKinley*, 174 F. Supp. 351 (E.D. Ark. 1959). The Federal Court in the latter case declared this statute unconstitutional; the State did not appeal from this holding. See also the Allen University and Benedict College cases, discussed *supra*, note 2, and *Academic Freedom and Tenure: Alabama State College*, 47 A.A.U.P. Bull. 303, 306 (1961).

For examples of the role and effect of local community attitudes on termination of faculty appointment in a general political context, see the reports on Sam Houston State College, Wayne State College, and Lincoln College, cited *supra* in note 1.

See as to both aspects Commager, *The Nature of Academic Freedom*, Saturday Review, August 27, 1966, 13.

Various other factors add to faculty and *amicus* concern. As suggested by initial developments in the instant case, the threat of prosecution or risk of dismissal constitute only several of a broad spectrum of possible intimidating and repressive measures. Often, these other measures are themselves of an affirmative nature. Often, however, they take the more insidious form of administrative non-action injurious to the faculty member;[5] implicated here as well are the corollary subtle constraints on administering university officials that develop where non-action rather than action on the one hand, and external and powerful public or community pressures on the other, are involved, and the attendant difficulties in any case as to proof and in providing due process in any significant sense of the term. There is further the peculiarly severe penalty of general loss of professional opportunity or occupation itself that teachers must pay or risk where

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[5] "A scholar who, through his writing, speeches, or lectures, offends the sensibilities of others—his colleagues, department chairmen, university authorities, interest groups, or large parts of the community—may thereby jeopardize the realization of several of his claims and prospects. Among those may be reappointment in a non-permanent position, promotion to a better position, an increase in his salary, the maintenance of his salary, a moderate teaching load, approval of his course offerings, security clearance for access to documents important for his research, [as well as] undisturbed privacy, freedom from harassment and vilification, freedom from hostile investigation expensive of money, time, and nervous energy." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. Bull. 753, 760 (1955).

To this list may be added the matter of initial appointment opportunities in other institutions.

charges or adverse action based on "loyalty" or "subversion" occur.[6]

The pervasive extent and effect of official or other repressive proscriptions emanating from outside the academic community have recently been indicated by the risks for faculty even in utilizing ordinary judicial processes to protect their constitutional rights, or perhaps more accurately their academic obligations. An illuminating example concerns the aftermath of a decision of this Court: A period of over five years proved necessary following *Shelton* v. *Tucker* in 1960 before any college or university faculty in a neighboring state having a statute of the same scope and effect as that struck down in that case, found it appropriate to bring suit to challenge the continued enforcement of the statute in that state.[7] Finally, the Association refers,

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[6] "More than in most other occupations, the dismissal of a professor jeopardizes or destroys his eligibility for another position in his occupation. The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work *consists* of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines. And if *some* professors lose their positions for what they write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced." Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. Bull. 753, 756 (1955).

[7] See [Fuchs,] *The Association and the Desegregation Controversy*, 48 A.A.U.P. Bull. 167, 169 (1962). Suit was finally instituted in July, 1966. *Mississippi State Conference of the A.A.U.P.* v. *Holmes*, (N. D. Miss. WC 6625). In Arkansas itself, the state whose statute was struck down in *Shelton*, the teachers who, pending the outcome of the suit, did not file affidavits, were in fact not reinstated. See *Academic Freedom and Tenure: University of Arkansas*, 49 A.A.U.P. Bull. 344 (1963).

In the instant case, it is noted that only four members of the entire faculty of the University of Buffalo refused to sign the

as a basis for its interest and concern, to the disruptive results within individual institutions and in their relationship with the general community caused by statutes and administrative action of an intrusive nature, with unfortunate consequences to education.[8]

In summary, the interest of the Association relates to the protection of fundamental constitutional rights and freedoms of teachers as citizens. It is based, still more importantly, on the threat proscriptions of the kind involved in this case present to vital societal objectives and needs which our colleges and universities exist to serve. This brief relates to both considerations.

STATEMENT AS TO FACTS

For a statement of the case, including the statutory and administrative provisions involved, reference is made to the briefs of the parties.

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certificate initially required, although as indicated by formal resolution of the local chapter of the Association and other statements of protest, a significant portion of the faculty objected to it. (Record, pp. 18, 27-29).

[8] For an example of such disruptive effect, see the statement of Chancellor Paul F. Sharp of the University of North Carolina in summarizing the consequences of the speaker-ban law of that state. Carter, *Speaker Ban: North Carolina Law Stirs Unrest at University, (I) and (II)*, 29 Science 589, 589-590, and 29 id. 725 (1965). An example in the context of loyalty requirements was the loyalty oath crisis some years ago at the University of California. In this connection Stewart, The Year of the Oath (1950). Storowitz, The Fundamental Issue, Documents and Marginal Notes on the University of California Loyalty Oath (1950); and Caughey, In Clear and Present Danger (1958).

QUESTIONS DISCUSSED BY AMICUS, AND SUMMARY OF ARGUMENT

Amicus curiae will contend that the Feinberg Law and its administrative machinery seriously abridge academic freedom. Initially it appears that the Feinberg Law differs in two respects from other state loyalty provisions which have recently come before this Court. First, the Feinberg Law has been held constitutional on its face, at least in substantial part, in *Adler* v. *Board of Education,* 342 U.S. 485 (1952). Since the time of the *Adler* decision, however, important changes have been made in the Feinberg Law which require careful reconsideration of the constitutional issues. Moreover, the applicable constitutional law has changed significantly since 1952, and for this reason too the *Adler* case must be reconsidered. The second difference is less important: The Feinberg Law, unlike most state loyalty provisions, requires neither a disclaimer of disloyalty nor an affirmation of loyalty. This formal distinction makes, however, no difference of substance to the underlying constitutional questions. For the basic purpose and effect of the Feinberg Law are identical to those of other loyalty arrangements of more conventional types: to disqualify certain persons from academic positions solely on the basis of their political views, activities and associations. It is the fact and effect of such disqualification, rather than the form or procedure by which it is imposed, that seriously jeopardizes academic freedom.

This brief will raise four central contentions: First, that major substantive changes in the Feinberg Law, and the quite different factual posture of the present case, require reconsideration of the *Adler* decision; second, that the rapid development of constitutional protection for public employees—especially through

the expansion of the doctrine of "unconstitutional conditions"—removes the main legal premise of *Adler;* third, that the Feinberg Law uses the test of loyalty (or the badge of suspected disloyalty) in several respects that are no longer constitutionally permissible under recent decisions of this Court; and fourth, that the Feinberg Law involves an unconstitutional bill of attainder. Throughout the brief our concern will be with the effect of the Feinberg Law upon the liberty of the academic community, to which this Court has recently accorded very substantial protection.

Because of the changes in both law and fact since 1952, it might well be sufficient to distinguish the *Adler* decision. This brief will, however, go further than to urge merely distinction. While we do not contend that disloyalty may never disqualify public school and college teachers, we contend that the means which New York has chosen for this purpose fail significantly to meet the modern constitutional standards. Thus we respectfully urge this Court to recognize the pervasive unsoundness of *Adler* by overruling that case.

ARGUMENT

Structure and Operation of the Feinberg Law. We are concerned here with the constitutionality of two sets of New York statutory provisions: Sections 3021 and 3022 of the Education Law; and section 105 of the Civil Service Law. Section 105 declares ineligible for public employment in civil service and academic positions all persons who advocate the overthrow of the government by force and violence. The disqualification is elaborated in several subsections which form the heart of the statute. A person is ineligible, *inter alia,* if he (a) advocates, advises or teaches, orally or in writing "the doctrine that the government of the United States or of any political subdivision thereof

should be overthrown or overturned by force, violence, or any unlawful means;" (b) if he "prints, publishes, edits, issues or sells any book" or other document which contains, advocates, advises or teaches the doctrine of violent overthrow (and personally "advocates, advises, teaches, or embraces the duty, necessity, or propriety of adopting the doctrine contained therein;") or (c) "organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means." Under this section, membership in the Communist Party of the United States or of the State of New York constitutes *prima facie* evidence of disqualification.

Another part of section 105, recently added, provides for the removal of any covered employee for "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts. . . ." The key words "treasonable" and "seditious" are defined by reference to appropriate sections of the Penal Law. The definition of "treasonable" raises no special problems. The definition of "seditious", however, draws in question the Penal Law provisions proscribing criminal anarchy; "sedition" is equated with "criminal anarchy" for these purposes. Penal Law section 160 defines criminal anarchy as the "doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means." In addition, the reference to the Penal Law appears to invoke section 161, which defines and proscribes *advocacy* of criminal anarchy. That section

prohibits numerous acts, including advocating, advising or teaching "the duty, necessity or propriety of overthrowing or overturning organized government by force or violence" or by assassination. In addition, this section imposes criminal liability on any person who:

> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or
>
> 3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or
>
> 4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

The heart of the Feinberg Law consists of Education Law sections 3021 and 3022, and various regulations which implement those sections. Section 3021 provides briefly that any school administrator or teacher shall be removed from his position "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position." Unlike the Civil Service Law provision, this section neither refers to

the Penal Law for a definition of the operative terms, nor contains within itself any further language which might offer a definition.

Section 3021 is followed by section 3022, which deals generally with "elimination of subversive persons from the public school system." This section directs the regents of the state university system to adopt certain procedures for the removal and disqualification of any school personnel who violate section 3021 or who are ineligible under section 105. The regents are to hold a hearing and compile a list of organizations which they find to be subversive (on the ground of advocacy or teaching of the violent overthrow of the Government). The regents must provide that membership in any listed organization shall constitute *prima facie* evidence of disqualification for appointment, or for retention in the state educational system. Finally, the regents are directed to prepare annual reports certifying their compliance with this section, and describing the methods used to ensure such compliance.

Pursuant to these statutes, the regents adopted a new set of regulations in the summer of 1949. These regulations require the adoption and implementation of certain local procedures to ensure compliance with the Civil Service and Education Law sections concerned with the employment of "subversives." Prior to the employment of any person, the nominating official must inquire of his former employers and other persons to determine whether the applicant is known to have violated any of the pertinent statutory provisions. Any such violation renders the applicant ineligible for the position. Each year the school officials must prepare a report on each covered employee, stat-

ing whether there is any evidence of violation of any of the pertinent statutes, including evidence of membership in any of the listed organizations. If such evidence is disclosed, the reporting official shall recommend the employee's dismissal, and within 90 days thereafter, the school officials must either prefer formal charges or reject the recommendation. Where the school authorities determine that the evidence indicates a violation, they shall immediately commence dismissal proceedings (according to various procedures detailed in this statute).

In 1953, after holding the requisite hearing, the regents determined that the Communist Party of the United States and of the State of New York were "subversive organizations", and listed them accordingly. Three years later the regents adopted the "Feinberg certificate", which required a declaration by each new applicant that he had read the Regents Rules; that he understood these Rules and the statutes cited therein constituted the terms of his employment; and that he was not now a member of the Communist Party—or that if he ever had been a member, he had communicated that fact to the President of the University. (Such certificates were not required, of course, of members of the University of Buffalo faculty until 1962, the year in which that institution became a part of the State University system.)

In June 1965, after the commencement of this case, the Trustees of the State University of New York substantially revised the procedure. The Feinberg certificate was no longer required of new applicants. It was further provided that no person previously employed would be deemed ineligible for continued employment "solely" because he refused to execute

the certificate. In lieu of the certificate, the Trustees now provided that each applicant should be informed before assuming his duties that the applicable loyalty-security statutes (sections 3021, 3022 and 105, *supra*) constituted part of his contract. He was particularly to be informed of the disqualification which accompanied membership in the listed organizations. The 1965 announcement further provides: "Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." Finally, the new regulations added that the fact of appointment or recommendation attested that "due inquiry has been made and that [the appointing officer] finds no reason to believe that the candidate is disqualified for the appointment." Shortly after the adoption of these new procedures, a brochure was prepared for the benefit of new applicants; the brochure outlines and explains briefly the legal effect of the pertinent statutes. It also invites any prospective employee who may have any question about possible disqualification to request an interview. The covering announcement concludes that "a prospective appointee who does not believe himself disqualified need take no affirmative action. No disclaimer oath is required." (New York law still requires a standard oath of allegiance of all new state employees; no constitutional questions concerning that oath are raised by this case.)

Despite the change in procedure, the substance of the statutory complex has been altered in no respect. Neither court nor legislature has narrowed or clarified the text of the many, uncertainly related, provisions. Nor has the administrative action of 1965

relaxed or dispensed with the application of any of these provisions to any state college or university teacher in New York. The regents remain, of course, at liberty to revive the old certificate procedure at any time—or even to promulgate a new and yet more onerous procedure for testing loyalty. Thus the change in procedure in no way moots any of the constitutional issues posed by the statute, nor does it reduce the urgency of their resolution.

I. MAJOR CHANGES IN THE PROVISIONS OF THE FEINBERG LAW, AND IMPORTANT FACTUAL DIFFERENCES, REQUIRE THE RECONSIDERATION OF ADLER v. BOARD OF EDUCATION.

Although some of the same constitutional questions are raised here as were considered in *Adler* v. *Board of Education,* both the legal context and the factual background of the cases are vitally different. Thus we contend that the resolution of the constitutional issues in *Adler* should not govern this case. Quite apart from the more basic question whether *Adler* should be overruled, which we shall consider *infra,* we contend that *Adler* can be readily distinguished because of these differences between the two cases.

First, the present case implicates a major provision of the Feinberg Law that was on the books in 1952, but not considered by the *Adler* Court. Education Law section 3021 requires the removal of all public school and college employees who have uttered "treasonable or seditious words" or have done "treasonable or seditious acts." Neither term is defined in that section, nor by reference to any other statute. The constitutionality of that section is before this Court for the first time; the *Adler* Court dismissed argument about the provision because "the constitutionality of this

section was not attacked in the proceedings below." 342 U.S. at 489.

A second important difference derives from the 1958 inclusion of Civil Service Law section 105(3) in the Feinberg complex. It is that section which requires, like Education Law section 3021, the removal of persons who utter "treasonable or seditious words" or commit "treasonable or seditious acts." The principal difference is that this provision defines the key terms by reference to Penal Law §§ 160 and 161, dealing with "criminal anarchy," and other provisions defining treason. The reference and attempted specificity are, as we shall see below, quite deceptive, for the attempt to particularize the terms "seditious words" and "seditious acts" has only added a new level of ambiguity to an already imprecise law. Moreover, this amendment applies only to the new section itself; there has been no attempt to define the same words in the older Education Law section 3021.

A third difference involves the specific focus of the present Feinberg Law upon the Communist Party. As the law stood in 1952, it merely directed the regents to investigate and to list any organization which they determined to be subversive. No such proceeding had then been undertaken. No applicant was required to disclaim or renounce membership in any particular organization. Since that time, not only has a regental investigation been held, resulting in the specific listing of the Communist Parties of the United States and of New York. In addition, largely on the strength of the regental determination, the legislature has woven the Communist proscription into the very fabric of the statute. This legislative action thus effectively supersedes the regental proscription. Although

no other organizations have been so listed, the possibility of further regental investigation remains open under the law.

The remaining differences concern the constitutional interests of the plaintiffs and the manner in which the constitutional questions are presented to this Court. For one, the particular academic freedom interests of *college and university professors* in New York are presented here for the first time. This is so in part because the teacher-plaintiffs in *Adler* were employed only in secondary school positions. More important, the statute was extended to cover college and university positions only after the *Adler* decision. Thus the particular academic freedom claims of higher education, which are central here, could not have been raised in the earlier case. As a further section of this brief will indicate, these claims are of an even higher constitutional order than the claims which can be made for other public employees.

The final difference concerns the clarity and immediacy with which the constitutional issues are presented. Although the majority of the Court felt in 1952 that the constitutional claims were properly before it, no proceedings had yet been instituted under the Feinberg Law. Justice Frankfurter, dissenting, stressed what must have been apparent to all members of the *Adler* court: "These teachers do not allege that they have engaged in proscribed conduct or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations for fear of the Feinberg Law's interdict .... They do not assert that they are threatened with action under the law, or that steps are imminent whereby they would incur the haz-

ard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law." 342 U.S. at 504 (Frankfurter, J., dissenting). It is clear that the majority of the *Adler* Court considered the constitutionality of the law only as a shell, with no evidence or indication as to the direction of its application, or even whether it would be invoked against any particular teachers. *Adler* went no further than to find the Feinberg Law, on its face, capable of a constitutional application. All questions concerning the procedure for listing particular "subversive organizations," the effect of such listing on the academic community, the procedures for disqualification and dismissal, were necessarily deferred to a later time. It is those questions which are now before this Court. The immediacy and concreteness so lacking in *Adler* have now been provided.

The facts of the present case tell much about the application of the Feinberg Law and its probable effect on the New York academic community. The five plaintiffs in the present case are, in Justice Frankfurter's words, "threatened with action under the law." They do claim that "steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law." One plaintiff (Starbuck) has been dismissed outright for refusal to answer certain questions about his past political activities and associations. Two others have been notified that, although they remain in the University's employ during the pendency of this case, dismissal proceedings will be commenced at once if the statute is sustained. The term of one other appellant has not been renewed, apparently because of his refusal to sign the certificate which the law formerly required.

In addition, initially there were with respect to various appellants salary losses, promotional slow-downs, and cancellation or failure to receive appointments to teach additional evening school classes. In none of these instances has there been any charge of disloyalty or membership in a proscribed group. The disabilities incurred by these appellants derive solely from their unwillingness to sign a certificate which appears to jeopardize them and their political activities. Thus the present case brings to this Court a record describing the very kind of concrete application and "imminence" of threat which were so obviously lacking in 1952. It is no longer possible to judge the statutory complex merely on its face. Even if it may once have been capable of an application innocuous to academic and associational freedom, events since *Adler* have removed that possibility and squarely presented a host of constitutional issues which were only conjectural when this statute first came before the Court.

II. THE FEINBERG LAW DEPRIVES NEW YORK TEACHERS OF ACADEMIC AND ASSOCIATIONAL FREEDOMS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. A Major Premise of Adler—That Public Employment May Be Conditioned on the Virtual Surrender of First Amendment Freedoms—Has Been Clearly Rejected by Subsequent Decisions of this Court.

The majority in *Adler* refused even to consider the claim that the Feinberg Law imposed an "unconstitutional condition." A major premise of the decision was the proposition that public employment, including academic employment, may be conditioned upon the relinquishment of liberties which could not be abridged by direct government action. The teachers involved in that case, observed Justice Minton, "may work for the school system upon the reasonable

terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." 342 U.S. at 492. Later the Court added that a teacher who was denied a public school position on political grounds "is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that that limitation is inherent in every choice." 342 U.S. at 493.

Recent decisions of this Court make clear that applicants for public employment cannot constitutionally be put to that choice. The Court of Appeals, in the earlier phase of this very case, remarked how little remained of *Adler* in this regard: "However, the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents,* 345 F.2d 236, 239 (2d Cir. 1965). Within a year of the *Adler* decision, in fact, this Court all but repudiated *Adler's* central premise. In *Wieman* v. *Updegraff,* 344 U.S. 183 (1952) the dispute centered about the requirement of scienter in a state loyalty oath. The Court found it unnecessary to consider whether there was an abstract constitutional "right" to public employment. But there was no doubt that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192.

Later constitutional decisions have refined and reinforced the principle that government benefits may

very seldom be withdrawn or denied on condition of the surrender of constitutional liberties. Several later cases involving public employment have underscored this principle. *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). In addition, the principle of the unconstitutional condition has been carried beyond public employment to other forms of government benefits, including membership in the bar, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); and the holding of a notary public's commission, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Perhaps the most dramatic application of the unconstitutional condition doctrine came in the recent case of *Sherbert* v. *Verner*, 374 U.S. 398 (1963). That case concerned the religious liberties of an applicant for unemployment compensation, unable to accept an available six-day job because her devout adherence to the Seventh Day Adventist faith precluded Saturday employment. There was no claim that the unemployment benefits were in any sense her constitutional "right." Indeed, her claim was of a somewhat lower order than that of the seeker of government employment. But she could not, the Court concluded, be constitutionally compelled to choose between the government benefit she sought and the completely free exercise of her religion. The Court equated the effects of direct and indirect restriction of first amendment freedoms: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 374 U.S. at 404. After considering the effect which the denial of a particular benefit might have upon the appellant's worship, the Court con-

cluded: "To condition the availability of the benefits upon the appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U.S. at 406. Since this decision, there can be no question that the Court has rejected *Adler's* prominent distinction between direct and indirect abridgments of first amendment liberties. Nothing remains of *Adler's* casual assumption that a school teacher sacrificed no constitutional liberties by taking the oath because he was always free to forgo the public school teaching position in order to keep his friends. At least since *Sherbert,* and probably since *Wieman,* indirect state restrictions of this sort must be judged as rigorously as direct infringements of the constitutional liberties which they affect.

If anything remains of the rationale of *Adler,* it might be well to consider why conditions on government benefits should be judged as critically as direct regulation. Why, after all, if the government has the unqualified power to refuse (or perhaps to withdraw) public employment and lesser benefits, does it not possess, a fortiori, the power to impose virtually any condition or qualification? Does not the greater power, in short, necessarily comprehend the lesser power? There are several answers to the argument, which effectively refute *Adler's* assumption. First, it is far from clear that the conditioning power is in fact a "lesser" power than unconditional denial or withdrawal of the benefit. The very fact of attaching the conditions, or the giving of reasons, is likely to deter behavior or affect conduct in ways and to a degree that the unconditional or unexplained denial of benefits cannot do. In this sense, then, the effect of the conditioning power may be far wider and far more inhibitory than the effect,

or even the arbitrary exercise, of the power to deny or withdraw without giving any reasons. Thus it may well be that the conditioning power is the greater power; if so, the premise of the "greater-includes-the-lesser" argument falls at the threshold.

Even if it be assumed that the conditioning power is a lesser exercise of the greater power of denial or withdrawal, the logic of the argument is unsound. Long before *Adler,* Justice Brandeis, dissenting in a case involving conditioned access to postal privileges, observed that "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated." *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U.S. 407, 430-31 (1921). A half century ago, too, Professor Thomas Reed Powell showed that the logic of the opponents of the unconstitutional conditions argument proved too much, and had been rejected elsewhere: "A person without any right to claim his life from the government is still protected by constitutional guarantees against other deprivations." Powell, The Right To Work For the State, 16 Colum. L. Rev. 99, 108 (1916). Recent decisions of this Court reinforce Powell's observation. For example, the power to execute a convicted criminal surely does not subsume the "lesser" power to put him to death through slow torture. Nor does the governmental power to execute a wartime deserter necessarily include the "lesser" discretion to deprive him of his nationality, even after formal proceedings. *Trop* v. *Dulles,* 356 U.S. 86 (1958). Outside the constitutional context, the "greater" power does not always compre-

hend the "lesser"; the employer's undoubted right to close down his business altogether does not permit him to close down part of the business or to take other less drastic measures when his aim is to thwart labor organization efforts. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). These and other cases suggest what should by now be clear: to the extent *Adler* rests upon the notion that government can condition or qualify public employment at will because it could deny or withdraw such employment unconditionally, it is no longer constitutionally tenable. With this principle established, it now remains to evaluate the Feinberg Law, in its present application, according to constitutionally proper criteria.

B. The Freedom of Inquiry and Association Within the Academic Community Has Received A High Order of Constitutional Priority.

The *Adler* decision not only rejected the unconstitutional conditions argument; it also implicitly rejected the special recognition which was being sought for the freedom of the academic community. The Court insisted that the state's security interests outweighed the interests of the individual teachers in free inquiry and association: "In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." 342 U.S. at 493. We contend that subsequent decisions have steadily enhanced the weight and dignity of academic freedom in the constitutional balance, and that the state interest given such deference in *Adler* can no longer be so casually recognized as paramount.

The development of constitutional recognition for academic freedom proceeded apace soon after the *Adler* decision. The following year, in *Wieman* v. *Updegraff,* the Court concluded that the First and Fourteenth Amendments protected "all persons, no matter what their calling," from subjection to excessive or unreasonable loyalty-security tests. But Justice Frankfurter, in his concurring opinion, added that "in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, in the case of teachers, brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Wieman* v. *Updegraff,* 344 U.S. 183, 195 (1952) (concurring opinion).

Soon other members of the Court gave official recognition to the constitutional stature of academic freedom. In *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-51 (1957), the holding concerned only the state's power to compel disclosure of various political activities, and the content of a lecture given by a visitor to a state university campus. But Chief Justice Warren, for the plurality, went much further: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our

colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." 354 U.S. at 250. Justice Frankfurter, in an important concurring opinion, added his staunch belief in the essentiality of academic freedom: "These pages need not be burdened with proof, based upon the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." 354 U.S. at 262 (concurring opinion).

Subsequent decisions have given even greater recognition and prominence to the constitutional interest in academic freedom. In public elementary and secondary education as well as in higher education, this Court's recent decisions involving loyalty and security measures have consistently recognized the need to protect the liberty of teachers and scholars to inquire, to investigate, to associate with others, and to pursue the studies in which they are interested and for which they are qualified without fear of governmental censorship or disability. Such decisions as *Shelton* v. *Tucker*, *Cramp* v. *Board of Public Instruction*, *Baggett* v. *Bul-*

litt, 377 U.S. 360 (1964), and most recently *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966), unite around this common theme of constitutional protection of academic freedom. While these decisions may well protect the rights of all public employees, and not only of academic personnel, the most important constitutional principles have been developed in the academic setting; it is there that the constitutional protections are most needed. Academic freedom, as Henry Steele Commager has recently observed, "is guaranteed to the scholar so that he can engage, fearlessly and vigorously, in pushing outward the boundaries of knowledge in every field." "It is guaranteed to the scholar so that he can train new generations of technicians and public servants who will freely exercise their intelligence on behalf of their society." Ammager, Is Freedom an Academic Question, Saturday Review, June 20, 1964, 54, 56.

C. The Feinberg Law Unconstitutionally Abridges Liberties of Expression and Association Protected by the First and Fourteenth Amendments.

It may well be, as *Adler* held, and as the Court below reaffirmed, that a state has a valid interest in barring certain persons from public employment—even in colleges and universities—on the basis of their advocacy and political activities or associations. We contend, however, that only a very narrow range of expression and activity, defined and proved according to rigorous standards, can constitutionally be used to disqualify such persons. And we contend that New York's definitions and procedures are defective in several respects when judged by those strict standards: first, because the Feinberg Law disqualifies an applicant on the basis of mere knowing membership in certain political groups;

second, because the statutory standards of disqualification are impermissibly vague and uncertain; and third, because New York's interest in protecting the schools and colleges from subversion can, and therefore must, be vindicated by less onerous means.

1. *The Feinberg Law creates an unconstitutionally broad standard of disqualification.* There is some uncertainty about just what advocacy and activities do disqualify a person for public employment in New York. But this much is certain: The scope of the proscription is far broader than is permitted under the recent decision of *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). For example, one who organizes or helps to organize or even becomes a member of a society or group of persons which teaches or advocates the violent overthrow of the Government or any subdivision thereof, is thereafter barred from public employment (Civil Service Law § 105 (1) (c)). This proscription operates without regard to the degree of the individual member's activity in the organization. It takes no account of the member's purpose in joining such a group; no opportunity is afforded the individual member to show that he joined the organization for the furtherance of its lawful activities, or to obtain further information about it. In short, the New York law draws no distinction whatever between the leaders of the group, who may be bent on subversion and who use the organization for that purpose, and its rank and file members who may well have quite different, and wholly lawful, reasons for belonging.

This is precisely the kind of indiscriminate classification that *Elfbrandt* v. *Russell* forbids. Whatever doubt may have remained since *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) about the power

to disqualify persons on the basis of mere membership in organizations with unlawful aims, none could survive *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964), and *Elfbrandt* v. *Russell, supra.* It is now clear that only active membership, with a specific intent to further the organization's unlawful goals, may be used to disqualify. That is, nothing less than the degree of association for which one may be criminally prosecuted, *Scales* v. *United States,* 367 U.S. 203 (1961), will bar him from public employment, state or federal. (Although *Elfbrandt* involved only the constitutionality of a particular form of oath, and not the ultimate question of Arizona's power to deny employment on such grounds, *Aptheker* resolves any doubts about such a distinction. For in *Aptheker,* the ultimate issue of government's power to deny or withdraw the right to travel abroad on the basis of mere knowing Communist Party membership was squarely before this Court. There was no suggestion that a legislative declaration of disability on the basis of political association would have fared better than the procedure involved in *Elfbrandt.* No recent decision has suggested—at least so long as the burden of proof rests on the applicant—that an unconstitutional standard of disqualification could be saved by varying the form in which it is imposed. And if the legislative declaration was invalid in *Aptheker,* that result should follow *a fortiori* here, because public employment (especially in teaching) would appear to enjoy at least as high an order of constitutional protection as foreign travel. Thus the present case cannot be distinguished from *Elfbrandt* by any formal difference in the disqualification procedure.)

Other provisions of the Feinberg Law also seem in conflict with *Elfbrandt.* Principally, there are the provisions directed explicitly at Communist Party mem-

bership. Both the regental action of 1953 and the legislative ratification of 1958 listed the Communist Party of the United States and of New York as a "subversive" organization to which New York state employees might not belong. Conceding that the statute requires proof of *knowing* membership, there is still no basis for reconciling these provisions with *Elfbrandt*. Nothing is said, or suggested, about active membership, or specific intent to further the Party's unlawful aims. Thus the Communist-disqualification provisions of the law would appear clearly invalid under the recent decisions of this Court.

The only possible distinction derives from the fact that the Feinberg Law's Communist provisions only make Party membership "prima facie evidence" of disqualification. The regulations provide that such membership, once proved or admitted, is presumed to continue to the present, "in the absence of a showing that such membership has been terminated in good faith." It is true that the employee or applicant disqualified on such grounds may seek a hearing, and that the ultimate burden of sustaining the order is upon the officials seeking the discharge or disqualification. But during the pendency of the proceeding the employee or applicant must be suspended without pay (with restitution to be made if he prevails on the merits). And as the New York Court of Appeals noted in the *Adler* case, the hearing procedure only affords "an opportunity to present substantial evidence contrary to the presumption sanctioned by the prima facie evidence. . . ." *Thompson* v. *Wallin*, 301 N.Y. 476, 494, 95 N.E.2d 806, 815 (1950). Thus even in those cases where past political activities or associations merely create a presumption, or provide *prima facie* evidence of disqualification, the burdens incurred by the individual are heavy. The price of such an

imposition may well be either withdrawal from a position for which the individual may be fully qualified, or the reluctant abandonment of political associations and activities for which he could not constitutionally be punished or penalized directly. Here, as in *Speiser* v. *Randall,* 357 U.S. 513 (1958), the fatal vice of the only hearing procedure available to the applicant is that "the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct must steer far wider of the unlawful zone than if the State must bear these burdens." 357 U.S. at 526.

Thus to the extent that the Feinberg Law makes certain political activities and associations *per se* grounds for disqualification or removal from public employment, it squarely conflicts with *Elfbrandt* v. *Russell.* To the extent that the law makes other associations merely *prima facie* evidence of disqualification, it relies upon a procedure—to transform inference into certainty—which places upon the applicant burdens that *Speiser* v. *Randall* bars.

2. *The Proscriptive Language of other Sections of the Feinberg Law is Unconstitutionally Vague and Uncertain.* To this point we have considered only those provisions of the Feinberg Law which rather specifically enumerate the grounds for disqualification. In addition, there are sections which describe the disqualifications in vague and ambiguous terms. These provisions, too, are unconstitutional on the quite different ground that their vagueness deters or is likely to deter much conduct that is constitutionally protected along with conduct which the state can constitutionally regulate. A few illustrations of the statute's sweep will support the argument.

Here, as in *Baggett* v. *Bullitt*, 377 U.S. 460 (1964), and *Cramp* v. *Board of Public Instruction, supra,* the applicant or employee is left in doubt about what he may not do if he wishes to obtain or retain public employment. The terms of the statute cover, for example, any person who "edits . . . any book . . . containing . . . the doctrine that the government of the United States . . . should be overthrown by force . . . and who . . . embraces the . . . propriety of adopting the doctrine contained therein. . . ." (Civil Service Law, § 105 (1) (b). Any scholar who edits a journal for which contributions are received from Communist countries, may reasonably wonder whether the contents of the publication could combine with some evidence of his own political views to forfeit his public employment.

Even more ominous for the conscientious public employee is the ambiguous effect of the language of sections 160 and 161 of the Penal Law, which enter the loyalty complex through Civil Service Law § 105(3). That section proscribes the utterance of treasonable or seditious words, or the doing of seditious or treasonable acts during the term of public employment. The Penal Law definition of "treason" is fairly precise; it is the definition of "sedition" (equated with "criminal anarchy") which raises the problems of uncertainty. "Seditious act" would appear to include, for example, carrying on a public street a copy of the Communist Manifesto: One is penalized who "publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means. . . ." (Penal Law, § 161 (4)). It is a crime in New York, and declared to be a "seditious act" for these purposes, to advocate, advise or teach "by word or mouth or writing. . . the duty, necessity

or propriety of overthrowing or overturning organized governments by force or violence. . . ." One commits a seditious act if he "openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing" not only of an officer of the United States Government, but of "any state or any civilized nation having an organized government. . . ." Finally, and perhaps most seriously, the statute declares "seditious" and thus a basis of ineligibility for public employment, the activity of any person who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine [of violent overthrow or assassination]." (Penal Law § 161(4)). The possible scope of such language is limitless; the fact that its probable scope or actual history of application may be much narrower, does not save it. For, as this Court declared in *Baggett* v. *Bullitt,* in striking down provisions of an oath no vaguer than those of the New York law: "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment of those with a conscientious and scrupulous regard for such undertakings." 377 U.S. at 373-74. Here precisely the same arguments apply, save for the constitutionally unimportant distinction that the sanction here is loss of employment, together with criminal liability

for the substantive violation, rather than prosecution for perjury. However improbable or implausible it may seem that New York officials would disqualify any present or prospective public servants on the basis of any of the vast range of activities and associations theoretically covered by the provisions just discussed, the bare possibility is sufficiently reinforced by the continued presence of such sweeping language in the statutes. Indeed, it is significant that the vaguest, most offensive terms were built into the law as recently as 1958, in an attempt to supply meaning for the already imprecise categories concerning "treason" and "sedition." Ironically, the attempt to narrow the law's scope only served to broaden its possible application; the sweep of the definitional sections is wider than any reasonable interpretation of the words they attempt to define.

A further ambiguity arises from the presence of the very same key terms—"seditious" and "treasonable"—in Education Law § 3021, but without the definitional reference to the Penal Law. Significantly, the constitutionality of that section was not before the Court in *Adler* and has not previously been passed upon. The two key words found in both sections are hardly specific when standing alone. Nor, as we have seen, do they acquire specificity when defined by reference to other, equally vague statutes. But the absence of any attempt to define these words in the old Education Law section serves only to underscore their vagueness: Should the Penal Law sections be incorporated here also by implication, or should the same words in the other statute be given a different meaning? Any civil servant may reasonably wonder about the quandary in which this curious lack of symmetry places him.

3. *New York's Interest in Protecting Its Educational System From Subversion Can, and Therefore Must, Be Served Through Less Onerous Means.* In determining the constitutionality of the provisions we have considered, it is relevant whether or not less onerous means are available to serve the same objectives. Recent decisions of this Court have stressed that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488-89 (1960); see also *Aptheker* v. *Secretary of State,* 378 U.S. 500, 512-14 (1964). In the case of a state loyalty-security program such as the one now before the Court, the availability of less drastic means should be apparent. Indeed, the very presence of criminal laws proscribing "criminal anarchy" and "treason" suggests the avenue of solution (although the particular language of these provisions in New York may well not pass constitutional muster). Most states have direct regulatory laws, designed either to prevent the use of positions of public trust for subversion of the government, or to discharge people who engage in advocacy that creates a clear and present danger. Whatever valid interests New York may have in proscribing such activities seem to be fully and adequately served by the provisions of the Feinberg Law covering those activities. But to the extent that the Feinberg Law goes further, it transcends the legitimate interests of the state at the expense of individual liberties. Even if more drastic regulation may sometimes be justified in the absence of other sanctions, the justification falls when less onerous means are not only theoretically available but actually exist.

III. THE FEINBERG LAW INVOLVES AN UNCONSTITUTIONAL BILL OF ATTAINDER.

We have already argued that the provisions of the Feinberg Law which make Communist Party membership, as such, evidence of disqualification, violate the First and Fourteenth Amendments. We also contend that these provisions constitute a bill of attainder. There can be no question that loss of or disbarment from public employment is a sufficient penalty, when visited upon persons specified in a statute, to evoke the attainder clause; criminal sanctions are not prerequisite to making such an argument. Indeed, in the earliest attainder cases in this Court, the sanctions included loss of employment and professional practice. *Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 227 (1867); *Ex Parte Garland,* 71 U.S. (4 Wall.) 333 (1867). The more recent case of *United States* v. *Lovett,* 328 U.S. 303 (1946), found a bill of attainder in the denial of compensation for government employment, obviously less drastic a sanction than the outright denial of a civil service position. Despite occasional suggestions to the contrary, no case has drawn a distinction between the imposition of criminal penalties and the deprivation of employment as the mark of a bill of attainder if the other conditions of such a bill are met.

Since the sanctions involved here are sufficient to invoke the attainder clause, the case becomes virtually indistinguishable from *United States* v. *Brown,* 381 U.S. 437 (1965). Here, as there, the critical fact is that disqualification is based solely upon a legislative determination that Communist Party members should be denied a particular government benefit (here government employment; there the right to hold positions of leadership in NLRB-certificated labor unions). The disqualification applies to a particular class of per-

sons, designated by affiliation if not by name. Although Communist Party membership was first made a basis for disqualification by the New York regents, the critical fact is that the designation was eventually incorporated into the statute. Thus the bar which is operative today is the decree of the legislature and not of the regents. Moreover, even if the regental judgment were still operative, the case would fall within *Brown;* for the critical element which transforms a mere disqualification into an attainder is the infliction of punishment or penalties without any judicial determination of guilt or disqualification. Thus it makes little difference whether the operative decision was that of the regents or the legislators.

The specific designation of Communist Party membership as the basis of disqualification serves to distinguish the present case from others in which attainder arguments have been rejected. In *Garner* v. *Board of Public Works,* 341 U.S. 716, 722-23 (1951), involving a municipal loyalty test, the Court was careful to point out that the disqualification attached to a broad range of affiliations, defined in terms of the nature and activities rather than the names of proscribed organizations. Similarly, it was the Congressional reluctance to name the Communist Party as the proscribed group that saved certain portions of the Internal Security Act of 1950 from invalidity on attainder grounds. *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 82-88 (1961). The difference between those cases and *Brown* makes clear on which side of the line the present case falls; for here it is the Communist Party that is singled out by name for disqualification. The rationale of the difference is indicated by the reasoning of the *Brown* majority, and is equally applicable here: To deprive a person of a

government benefit on the ground of membership in a named group creates a classification defective in two respects; it is both under-inclusive and over-inclusive at the same time. It is under-inclusive because it fails to proscribe membership in other groups that may create similar threats, and even precludes the possibility of extending the proscription if conditions change. At the same time, such a classification is over-inclusive in that it presumes all members of the named organization pose the threat to which the proscription was aimed; it takes no account of the degree of their individual activity or adherence to the organization's illegal aims. Thus, while the same objective might be achieved through an open-ended classification, the designation of a particular organization places the disqualification precisely under the attainder clause.

CONCLUSION

An outstanding commentator has, in the very context of the implications of community action and pressures relating to the problem of alleged subversives in higher education, recently emphasized that the university is the only institution in Western society whose business it is to search for and transmit truth regardless of all competing and conflicting pressures and demands, and as such is the chief instrument whereby society provides itself with a continuous flow of ideas and with independent criticism and advice. Commager, *The Nature of Academic Freedom, Saturday Review,* August 27, 1966, 13, 36-37. He proffers the conclusion that, if the academy is to perform its special obligation to act as the critic and conscience of society, it must be free to fix its own standards and determine its own credentials, and must be protected from the consequences of substituting irrelevant and pernicious

criteria for professional ones in the selection of its members.

It is respectfully submitted that the Feinberg Law and its administrative machinery are incompatible with these considerations and conflict with the essential function and obligation of the university. On the basis of the argument as developed in this brief, it is further submitted that the Law and its machinery are inconsistent as well with key constitutional principles and objectives.

Respectfully submitted,

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APPENDIX

Academic Freedom and Tenure

1940 Statement Of Principles

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement, known to the profession as the 1940 *Statement of Principles on Academic Freedom and Tenure,* was officially endorsed by the following organizations in the years indicated:

Association of American Colleges	1941
American Association of University Professors	1941
American Library Association (adapted for librarians)	1946
Association of American Law Schools	1946
American Political Science Association	1947
American Association of Colleges for Teacher Education[1]	1950
Association for Higher Education, National Education Association	1950
Eastern Psychological Association	1950
American Philosophical Association:	
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Pacific Division	1962
Southern Society for Philosophy and Psychology	1953
American Psychological Association	1961
American Historical Association	1961
Modern Language Association of America	1961
American Economic Association	1962
American Farm Economic Association	1962
Midwest Sociological Society	1963

[1] Endorsed by predecessor, American Association of Teachers Colleges, in 1941.

Mississippi Valley Historical Association 1963
American Philological Association 1963
American Council of Learned Societies 1963
Speech Association of America 1963
American Sociological Association 1963
Southern Historical Association 1963
American Studies Association 1963
Southern Economic Association 1963
Association of American Geographers 1963
Classical Association of the Middle West and South 1964
Southwestern Social Science Association 1964
Archaeological Institute of America 1964
Southern Management Association 1964
American Educational Theatre Association 1964
South Central Modern Language Association 1964
Southwestern Philosophical Society 1964
Council for the Advancement of Small Colleges 1965
Mathematical Association of America 1965
Arizona Academy of Science 1965
Council of the Western History Association 1965
American Risk and Insurance Association 1965
Academy of Management 1965
American Catholic Philosophical Association 1966
Association of State Colleges and Universities 1966

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher[2] or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

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[2] The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his

profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Academic Tenure

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Interpretations

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8, 1940, the following interpretations of the 1940 Statement of Principles on Academic Freedom and Tenure were agreed upon:

1. That its operation should not be retroactive.
2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance

with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.

3. If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on *Academic Freedom* and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a) (4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Statement on Procedural Standards in Faculty Dismissal Proceedings

The following *Statement on Procedural Standards in Faculty Dismissal Proceedings* was prepared by a joint committee representing the Association of American Colleges and the American Association of University Professors and was approved by these two associations at their annual meetings in 1958. It supplements the 1940 *Statement of Principles on Academic Freedom and Tenure* by providing a formulation of the "academic due process" that should be observed in dismissal proceedings. The exact procedural standards here set forth, however, "are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure,* but are presented rather as a guide. . . ."

Introductory Comments

Any approach toward settling the difficulties which have beset dismissal proceedings on many American campuses

must look beyond procedure into setting and cause. A dismissal proceedings is a symptom of failure; no amount of use of removal process will help strengthen higher education as much as will the cultivation of conditions in which dismissals rarely if ever need occur.

Just as the board of control or other governing body is the legal and fiscal corporation of the college, the faculty are the academic entity. Historically, the academic corporation is the older. Faculties were formed in the Middle Ages, with managerial affairs either self-arranged or handled in course by the parent church. Modern college faculties, on the other hand, are part of a complex and extensive structure requiring legal incorporation, with stewards and managers specifically appointed to discharge certain functions.

Nonetheless, the faculty of a modern college constitute an entity as real as that of the faculties of medieval times, in terms of collective purpose and function. A necessary pre-condition of a strong faculty is that it have first-hand concern with its own membership. This is properly reflected both in appointments to and in separations from the faculty body.

A well-organized institution will reflect sympathetic understanding by trustees and teachers alike of their respective and complementary roles. These should be spelled out carefully in writing and made available to all. Trustees and faculty should understand and agree on their several functions in determining who shall join and who shall remain on the faculty. One of the prime duties of the administrator is to help preserve understanding of those functions. It seems clear on the American college scene that a close positive relationship exists between the excellence of colleges, the strength of their faculties, and the extent of faculty responsibility in determining faculty membership. Such a condition is in no wise inconsistent

with full faculty awareness of institutional factors with which governing boards must be primarily concerned.

In the effective college, a dismissal proceeding involving a faculty member on tenure, or one occurring during the term of an appointment, will be a rare exception, caused by individual human weakness and not by an unhealthful setting. When it does come, however, the college should be prepared for it, so that both institutional integrity and individual human rights may be preserved during the process of resolving the trouble. The faculty must be willing to recommend the dismissal of a colleague when necessary. By the same token, presidents and governing boards must be willing to give full weight to a faculty judgment favorable to a colleague.

One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 *Statement of Principles on Academic Freedom and Tenure* and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 Statement and standards which have developed in the experience of academic institutions.

This statement deals with procedural standards. Those recommended are not intended to establish a norm in the same manner as the 1940 *Statement of Principles on Academic Freedom and Tenure,* but are presented rather as a guide to be used according to the nature and traditions of particular institutions in giving effect to both faculty tenure rights and the obligations of faculty members in the academic community.

Procedural Recommendations

1. Preliminary Proceedings Concerning the Fitness of a Faculty Member

When reason arises to question the fitness of a college or university faculty member who has tenure or whose term appointment has not expired, the appropriate administrative officers should ordinarily discuss the matter with him in personal conference. The matter may be terminated by mutual consent at this point; but if an adjustment does not result, a standing or *ad hoc* committee elected by the faculty and charged with the function of rendering confidential advice in such situations should informally inquire into the situation, to effect an adjustment if possible and, if none is effected, to determine whether in its view formal proceedings to consider his dismissal should be instituted. If the committee recommends that such proceedings should be begun, or if the president of the institution, even after considering a recommendation of the committee favorable to the faculty member, expresses his conviction that a proceeding should be undertaken, action should be commenced under the procedures which follow. Except where there is disagreement, a statement with reasonable particularity of the grounds proposed for the dismissal should then be jointly formulated by the president and the faculty committee; if there is disagreement, the president or his representative should formulate the statement.

2. Commencement of Formal Proceedings

The formal proceedings should be commenced by a communication addressed to the faculty member by the president of the institution, informing the faculty member of the statement formulated, and informing him that, if he so requests, a hearing to determine whether he should be removed from his faculty position on the grounds stated will be conducted by a faculty committee at a specified time

and place. In setting the date of the hearing, sufficient time should be allowed the faculty member to prepare his defense. The faculty member should be informed, in detail or by reference to published regulations, of the procedural rights that will be accorded to him. The faculty member should state in reply whether he wishes a hearing and, if so, should answer in writing, not less than one week before the date set for the hearing, the statements in the president's letter.

3. Suspension of the Faculty Member

Suspension of the faculty member during the proceedings involving him is justified only if immediate harm to himself or others is threatened by his continuance. Unless legal considerations forbid, any such suspension should be with pay.

4. Hearing Committee

The committee of faculty members to conduct the hearing and reach a decision should either be an elected standing committee not previously concerned with the case or a committee established as soon as possible after the president's letter to the faculty member has been sent. The choice of members of the hearing committee should be on the basis of their objectivity and competence and of the regard in which they are held in the academic community. The committee should elect its own chairman.

5. Committee Proceeding

The committee should proceed by considering the statement of grounds for dismissal already formulated, and the faculty member's response written before the time of the hearing. If the faculty member has not requested a hearing, the committee should consider the case on the basis of the obtainable information and decide whether he should be removed; otherwise the hearing should go forward. The

committee, in consultation with the president and the faculty member, should exercise its judgment as to whether the hearing should be public or private. If any facts are in dispute, the testimony of witnesses and other evidence concerning the matter set forth in the president's letter to the faculty member should be received.

The president should have the option of attendance during the hearing. He may designate an appropriate representative to assist in developing the case; but the committee should determine the order of proof, should normally conduct the questioning of witnesses, and, if necessary, should secure the presentation of evidence important to the case.

The faculty member should have the option of assistance by counsel, whose functions should be similar to those of the representative chosen by the president. The faculty member should have the additional procedural rights set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure,* and should have the aid of the committee, when needed, in securing the attendance of witnesses. The faculty member or his counsel and the representative designated by the president should have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member should have the opportunity to be confronted by all witnesses adverse to him. Where unusual and urgent reasons move the hearing committee to withhold this right, or where the witness cannot appear, the identity of the witness, as well as his statements, should nevertheless be disclosed to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence should be duly recorded. Unless special circumstances warrant, it should not be necessary to follow formal rules of court procedure.

6. Consideration by Hearing Committee

The committee should reach its decision in conference, on the basis of the hearing. Before doing so, it should give opportunity to the faculty member or his counsel and the representative designated by the president to argue orally before it. If written briefs would be helpful, the committee may request them. The committee may proceed to decision promptly, without having the record of the hearing transcribed, where it feels that a just decision can be reached by this means; or it may await the availability of a transcript of the hearing if its decision would be aided thereby. It should make explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion may be desirable. Publicity concerning the committee's decision may properly be withheld until consideration has been given to the case by the governing body of the institution. The president and the faculty member should be notified of the decision in writing and should be given a copy of the record of the hearing. Any release to the public should be made through the president's office.

7. Consideration by Governing Body

The president should transmit to the governing body the full report of the hearing committee, stating its action. On the assumption that the governing board has accepted the principle of the faculty hearing committee, acceptance of the committee's decision would normally be expected. If the governing body chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It

should frame its decision and communicate it in the same manner as before. Only after study of the committee's reconsideration should the governing body make a final decision overruling the committee.

8. Publicity

Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements about the case by either the faculty member or administrative officers should be avoided so far as possible until the proceedings have been completed. Announcement of the final decision should include a statement of the hearing committee's original action, if this has not previously be made known.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

Appellants,

—v.—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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In the

Supreme Court of the United States

October Term, 1966

No. 105

Harry Keyishian, George Hochfield, Newton Garver, Ralph N. Maud, and George E. Starbuck,

Appellants,

—v.—

Board of Regents of the University of the State of New York, Board of Trustees of the State University of New York, State University of New York at Buffalo, Clifford C. Furnas, J. Lawrence Murray, Arthur Levitt, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk,

Appellees.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of the *Amici*

The American Civil Liberties Union and the New York Civil Liberties Union, which file this brief with the consent of the parties, believe that the case at bar raises fundamental First Amendment questions. To require the execution of loyalty oaths and conformance to "anti-subversive" statutes by petitioners and other applicants for public employment substantially restricts the free expression of unpopular beliefs and ideas.

Questions Presented

(1) Whether the statutes in question unconstitutionally limit public employment of teachers and scholars at the university level because they restrain speech protected by the First Amendment as made applicable to the States by the Fourteenth; and

(2) Whether the statutes and administrative rules and procedures are unconstitutional since, taken as a whole, their effect is substantially to restrict First Amendment freedoms without substantially enhancing any legitimate state interest which could not be as well served by means less restrictive of such freedoms.

Statutes Involved

Section 3021, New York Education Law, is captioned, "Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances," and provides:

> "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Section 3022, New York Education Law, is captioned, "Elimination of subversive persons from the public school system," and provides:

> 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers

or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it.

The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

SUBDIVISION 1 OF SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Ineligibility of persons advocating overthrow of government by force or unlawful means," and provides:

"No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any

state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

Subdivision 3 of Section 105, New York Civil Service Law, is captioned, "Removal for treasonable and seditious acts or utterances," and provides:

"A person in the civil service of the state or of any civil division thereof shall be removable therefrom for

the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law."

SECTIONS 160 AND 161 OF THE NEW YORK PENAL LAW provide:

"SECTION 160. *Criminal anarchy defined.*

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"SECTION 161. *Advocacy of criminal anarchy.*

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching

the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, without intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

Statement of the Case

This suit challenges the constitutionality of Section 105 of the New York State Civil Service Law and the statutes incorporated by reference therein, Sections 3021 and 3022 of the New York Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York (hereinafter referred to as the Regents Rules), and the certificates and procedures used under the various statutes and rules. The statutes, in general, provide for the elimination from employment in state-supported schools, colleges and universities of persons deemed "subversive". The administrative program requires, as a

condition of employment, the execution of a disclaimer and loyalty certificate. Plaintiffs sued as teachers and employees at the State University of New York at Buffalo. Plaintiffs Keyishian, Hochfield, Garver and Maud declined to sign the Trustee's Certificate and because of this failure, dismissal proceedings were brought against them on grounds of insubordination. Plaintiff Keyishian's term has ended and it has not been renewed because of his failure to sign the certificate. Plaintiffs Hochfield's and Garver's terms have not expired and they have been informed dismissal proceedings have been stayed pending the outcome of this suit. Plaintiff Maud has resigned from the University. Plaintiff Starbuck has been terminated because he failed to answer whether he had ever advised, taught or been a member of a group that taught or advocated the overthrow of the government by force and violence.

This appeal is from the decision of a three judge district court (R. 278 *et seq.*) which denied all the relief requested by the appellants.

ARGUMENT

I.

The statutes in question unconstitutionally limit public employment of teachers and scholars at the university level because they restrain speech protected by the First Amendment as made applicable to the states by the Fourteenth.

A. *A statute which imposes conditions to public employment having the effect of restricting First Amendment freedoms is subject to the "balancing" test to determine its constitutionality.**

It is now abundantly clear that state employees, and particularly teachers, enjoy the protection of freedom of speech, thought, and association guaranteed by the First Amendment as made applicable to the states by the Fourteenth. The notion which once enjoyed some currency, that public employment and other government benefits, since they might be withheld altogether, may be subjected to any conditions which the state chose to impose, has been thoroughly discredited. *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961); *Torcaso* v. *Watkins,* 367 U. S. 488 (1961); *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956); *Wieman* v. *Updegraff,* 344 U. S. 183

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* *Amici* believe that where First Amendment rights are at stake, the clear and present danger test is best designed to give widest latitude to the precepts of a free society without endangering competing social interests. For the purposes of this case, however, we confine the argument to the "balancing" test because we believe the statutes at bar are unconstitutional even under that narrower formulation.

(1952); *U. S.* v. *Lovett,* 328 U. S. 303 (1946), see Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 Cornell L. Q. 12 (1955).

Wieman v. *Updegraff, supra,* held unconstitutional an Oklahoma statute which required every state employee, as a condition of employment, to execute an oath to the effect that he was not affiliated with any organization which had been listed by the United States Attorney General as subversive. The Court held:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one. Indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler* and *Gerende* [in which only knowing membership was at issue] is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process" (344 U. S. at 190-191).
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> * * * * *
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> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the

> public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at 192).

When conditions to public employment restrict First Amendment freedoms, it is no longer sufficient that they be merely "not patently arbitrary or discriminatory." *Shelton* v. *Tucker, supra,* clearly holds that such conditions must meet the standards of a full scale "balancing" test. *Shelton* declared unconstitutional an Arkansas statute which required every teacher, as a condition to employment in a state-supported school or college, to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years. The Court held:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose" (364 U. S. at 488).

The statutory complex and administrative procedures challenged by appellants directly impinge on the area protected by the First Amendment. They impose direct restrictions on speech and association, both as a condition of employment, as well as its continued retention. As was noted in *Shelton, ibid.,* the "administrative leeway" which is permissible in the service of a clearly constitutional purpose in other areas cannot be justified in the First Amendment's sphere.

The "balancing" test has also been adopted in other closely analogous contexts involving the imposition of conditions impairing First Amendment freedoms to the enjoyment of other state-conferred "privileges". *N. A. A. C. P.* v. *Alabama,* 377 U. S. 288 (1964) (right of foreign corporation to do business within state); *Speiser* v. *Randall,* 357 U. S. 513 (1958) (tax exemption).

B. *The effect of the statutes in question is to restrain significant areas of constitutionally-protected speech.*

The statutes called into question by the present suit are Section 3021 of the New York Education Law and Section 105 of the New York Civil Service Law, which are discussed here and Section 3022 of the New York Education Law which is discussed in Point II, *infra.*

These statutes intrude into constitutionally-protected areas of speech for they impose, through conditions to employment, a broader proscription of speech than could be constitutionally imposed by means of a direct restriction in two respects: first, in the use of the word "seditious", and second, in the failure to distinguish between advocacy of abstract doctrine and advocacy that incites to action.

In the absence of further definition, the word "seditious" as it appears in Section 3021, New York Education Law, would seem obviously to include within its coverage a substantial though indeterminate area of constitutionally-protected speech. Consider, for example, this definition of "sedition":

> "Excitement of discontent against the government, or of resistance to lawful authority." (Webster's New Collegiate Dictionary, 1958.)

Although the majority of the Court in *Adler* v. *Board of Education,* 342 U. S. 485 (1952), did not pass on the constitutionality of Section 3021 (342 U. S. at 496), Mr. Justice Frankfurter pointed out in his dissenting opinion:

> "In the light of the experience under the Sedition Act of 1798, 1 Stat. 596, 'seditious' can hardly be deemed a self-defining term or a word of art" (342 U. S. at 506).

"Seditious" is one of those words well calculated to arouse passion and prejudice. Almost any change which is strongly resisted by those in power has been so denominated. Scottish judges once so labeled the demand for manhood suffrage.*

Quite possibly, the word "seditious" as used in Section 3021 of the Education Law might be construed to have the same meaning as is used in Section 105, Subdivision 3, of the Civil Service Law, which in turn refers to the Penal Law definition of "criminal anarchy." ** Even assuming this to be true, however, we are still left with a definition which is too broad, since Section 160 of the Penal Law does not specify what organized governments are referred to. The words "organized government" are not preceded by an article or qualifier of any kind. And whether or not Section 161 of the Penal Law is directly incorporated in Section 105, Subdivision 3, of the Civil Service Law, it is certainly relevant in construing Section 160 of the Penal

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* See Chafee, Free Speech in the Constitution (1941), p. 26, citing May, Constitutional History, II, 38-41.

** There is however no legislative declaration that Education Law, Section 3021, is similarly limited, although the Court of Appeals assumed that they would be defined in the same way.

Law; and Subdivision 3 of Section 161 indicates that the reference is to *any* organized government, whatever its nature, foreign or domestic.

Section 161 of the Penal Law contains four subdivisions, each of which in some manner restricts freedom of expression or of association. It forbids not only the advocacy of the commission of certain acts declared illegal by Section 160 but also advising or teaching the propriety of such acts. Subdivision 2 is particularly comprehensive since it deals with the distribution of any material "containing" the doctrine of the overthrow of the government by force. That would probably ban the distribution of any material that discussed the pros and cons of revolution and might even include our Declaration of Independence.

It is shocking to contemplate that teachers, especially in institutions of higher learning, should be subject to loss of jobs if they have ever done anything coming within any of these vague and all-embracing provisions.

These observations, of course, apply specifically to Civil Service Law Section 105, subd. 1, which includes, in identical language, subdivisions 1, 2, and 4 of Penal Law Section 161.

The second respect in which the statutes restrain constitutionally protected speech is, as already mentioned, their failure to distinguish between advocacy of abstract doctrine and advocacy that incites to action. *Dennis* v. *United States, supra,* upheld the constitutional validity of the Smith Act, 18 U. S. C. §2385, which proscribes the forbidden conduct in much the same language as appears in Subdivision 1 of Section 105 of the New York Civil Service Law. The limited scope of the *Dennis* decision, however, was made very clear in two subsequent cases, *Yates*

v. *United States,* 354 U. S. 298 (1957), and *Noto* v. *United States,* 367 U. S. 290 (1961).

In *Yates* v. *United States,* it was said:

> "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not" (354 U. S. at 318).
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> "We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation . . . The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government and not of principles divorced from action" (354 U. S. at 319-20).
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> ". . . [T]he District Court apparently thought that Dennis obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action.
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> "This misconceives the situation confronting the Court in Dennis and what was held there" (354 U. S. at 320-1).

And in *Noto* v. *United States,* the distinction was:

> "... 'not of ... mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to ... action' immediately or in the future" (367 U. S. at 297).
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> "We held in Yates, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action" (367 U. S. at 297-8).

Though *Yates* and *Noto* were decided by construction of the statute involved rather than on a constitutional base, it was clear that what was being skirted was "a constitutional danger zone ... clearly marked" (*Yates,* 354 U. S. at 319). It might be argued that the statutes at bar, like the Smith Act, are capable of the restrictive construction of *Yates* and *Noto.* In reply, it is necessary only to point out that there has been no such construction of the present statutes.

C. *The proscription of a substantial area of constitutionally-protected speech on the part of all publicly-minded university teachers and scholars, both within and without the classroom, constitutes so serious a restriction of freedom of speech as to be incapable of justification by any present legitimate state interest.*

The rationale of freedom of speech as guaranteed by the First Amendment has been stated too well elsewhere to bear restatement here. See *Gitlow* v. *New York,* 268 U. S. 652, 672-3 (1925) (dissenting opinion of Mr. Justice Holmes); *Whitney* v. *California,* 274 U. S. 357, 373-9 (1927) (concurring opinion of Mr. Justice Brandeis).

We submit that nowhere is the full scope of constitutionally protected freedom of speech more appropriate and nowhere more essential than in our colleges and universities. Consequently, the states cannot constitutionally impose as a condition to employment at the university level an absolute restraint upon a substantial area of constitutionally protected speech, operative upon all publicly-employed teachers and scholars within and without the classroom.

In *Barenblatt* v. *United States,* 360 U. S. 109, 112 (1959), the Court stated:

> "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."

In *Shelton* v. *Tucker,* 364 U. S. 479, 487, the Court observed:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion)."

In *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250, 251 (1957), it was said:

"The essentiality of freedom in the community of American universities is almost self-evident. * * * Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

* * * * *

"We do not conceive of any circumstances wherein a state interest would justify infringement of rights in these fields."

The view expressed in the last quotation follows inescapably from a consideration of the functions served by our colleges and universities in the light of the rationale of constitutional protection of freedom of speech. If this be true, then the statutes in question are unconstitutional.

II.

The statutes and administrative rules and procedures are unconstitutional since, taken as a whole, their effect is substantially to restrict First Amendment freedoms without substantially enhancing any legitimate state interest which could not be as well served by means less restrictive of such freedoms.

The statutory and administrative scheme in question is shot through with defects and uncertainties, several of which would independently suffice to raise serious constitutional questions, and all of which taken together renders the scheme clearly unconstitutional.

The present case was precipitated by the refusal of plaintiffs to execute the so-called "Trustee's Certificate." The Certificate exists in two forms, copies of which are annexed to the complaint as Exhibits "A" and "B" respectively.

Exhibit "A" follows:

"STATE UNIVERSITY OF NEW YORK AT BUFFALO

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * * * *

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

....

Date Signature "

Exhibit "B" differs only in that it expects from the rules, regulations and laws made a part of the signer's terms of employment, the "Education Commissioner's Memorandum" (Regents Rules on Subversive Activities, pages 9-12 (1959)).

Appellants have alleged in paragraphs twenty-ninth, thirtieth and forty-second of the complaint that their employment will be terminated without a hearing for their failure to execute the Certificate.

The Certificate states categorically:

> "Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University."

Further, several plaintiffs will have their employment terminated for the simple reason of their failure to execute the Certificate. Since a present member of the Communist Party or of any organization that advocates violent overthrow could not truthfully execute the Certificate, the effect would be termination of employment for innocent as well as "knowing" membership. This result, which would follow both from an application of the language of the Certificate and from the threatened outright termination of employment for refusal to execute the Certificate, would be clearly unconstitutional. *Wieman* v. *Updegraff, supra.* It is recognized that the Feinberg Law, Section 3022, New York Education Law, has been construed to apply only to "knowing" membership and to provide that such membership constitutes only a presumptive ground for disqualification, which may be rebutted by the person charged at the hearing in which the presumption arises. See *Adler* v. *Board of Education,* 342 U. S. at 494-5.

Such a construction is no longer sufficient. "Knowing membership" alone is not enough; proof of such membership together with "specific intent" to further unlawful ends *and* actual participation in unlawful activities must all be shown, if the requisite standards of the First Amendment are to be met. As was said in *Elfbrandt* v. *Russell*:

"Any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent', would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State,* 378 U. S. 500." 384 U. S. at 16.

"Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization's unlawful ends. Here as in *Baggett* v. *Bullitt, supra,* the 'hazard of being prosecuted for knowing but guiltless behavior' (*id.,* at 373) is a reality." 384 U. S. at 16.

"Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action, impose, in effect, a conclusion presumption that the member shares the unlawful aims of the organization." 384 U. S. at 17.

In view of the fact that the "Education Commissioner's Memorandum" is expressly excepted from the scope of the form of the Certificate set forth as Exhibit "B" to the complaint, it is quite possible that the "Memorandum" is not intended to be included within the rules and regulations referred to in either form of the Certificate. This point is not made clear, however, and the "Memorandum" is itself a source of confusion, suggesting an unconstitutional application of the statutes. For example, the "Memorandum," at page 12 of "Regents Rules on Subversive Activities," states:

> "But the statutes and the Regents Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher *in whose case there is evidence that he is guilty* of subversive activity." (Emphasis added.)

This statement, if taken literally, and in combination with the requirement that the teacher, as a condition to further employment, execute the disclaimer embodied in the Certificate, would seem clearly to contravene the holding in *Speiser* v. *Randall, supra,* that when First Amendment freedoms are at stake, the burden of proof cannot be shifted from the government to the individual.

Consider also the remoteness of the inquiry as to past membership, whether "knowing" or "innocent", in the Communist Party. Disclosure is required, for example, even of innocent membership during the 1930's. Cf. *Schwdre* v. *Board of Bar Examiners,* 353 U. S. 232 (1957); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 534 (1963).

The kind of membership proscribed under the present statutes, since it is not limited to "active" membership, is apparently broader than could be constitutionally proscribed by means of direct criminal sanctions. Cf. *Scales* v. *United States,* 367 U. S. 203 (1961).

The means of enforcement of the statutes spelled out in the "Regents Rules on Subversive Activities," together with the requirement that all teachers execute the Certificate, with its blanket disclosure requirement, might very well constitute the sort of "systematic and continuous surveillance" referred to as a dubious possibility by Mr.

Justice Frankfurter in his opinion in *Adler* v. *Board of Education,* 342 U. S. at 507, in which he dissented on the essentially procedural ground that the claim before the Court was too abstract.

Attempting merely to determine the extent to which these statutes apply to university teachers is a complicated task. Section 3021, New York Education Law, purports to apply only to "public schools, in any city or school district." And Section 3022 does not necessarily render Section 3021 applicable to university teachers, for it refers to persons "who violate the provisions of section three thousand twenty-one of this article *or* who are ineligible . . . on any of the grounds set forth in Section twelve-a of the Civil Service Law [now Section 105, subdivisions 1 and 2]" (emphasis added). The Certificate, however, purports to make Section 3021 applicable to university teachers, since it (Section 3021) is set forth and cited in the publication entitled "Regents Rules on Subversive Activities," which is incorporated by reference in the Certificate.

A further point of uncertainty as to the application of the statutes exists in the fact that Section 3022, Subdivision 1, New York Education Law, provides that the Board of Regents shall adopt rules and regulations for the disqualification or removal of persons who violate Section 3021 of the Education Law or are ineligible under Section 12-a (now Section 105, Subdivisions 1 and 2) of the Civil Service Law. Yet the Regents Rules apparently are directed only to "the school authorities of each school district." Rules of the Board of Regents, Section 244 (as published in "Regents Rules on Subversive Activities," *supra,* at page 5), Section 20.1 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

When these difficulties of construction are added to the sources of uncertainty and confusion already mentioned, both under the present Point and Point I—most notably the lack of distinction between advocacy of abstract doctrine and incitement to action, uncertainty and overbroadness of the meaning of "seditious", uncertainty as to the effect of the "Education Commissioner's Memorandum," and treatment, both in the Certificate and the alleged procedure for termination of employment, of membership as a *per se* ground of disqualification—it hardly does justice to the situation to term it confusing in the extreme.

A teacher required to sign this Certificate is not only confronted with a statement of the law which either is inadequate and misleading or is clearly unconstitutional, he is not only asked to make a blanket disclosure of any membership in the Communist Party, whether innocent or "knowing" and no matter how remotely in the past, but he is required to signify his assent to a hopelessly confusing jumble of statutes, rules and administrative procedures and statements, the full scope of which is practically impossible to determine but which would seem to intrude significantly into areas of constitutionally-protected freedom of speech and association. A conscientious person could reasonably fear that he is asked to agree in advance to refrain from some unascertainable area of constitutionally-protected speech and association. As in *Cramp* v. *Board of Public Instruction*, 368 U. S. at 286:

> "The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive."

The requirement that, as a condition to public employment, plaintiffs and all other university teachers and scholars execute this Certificate is, we submit, unconstitutional under the rationale of *Baggett* v. *Bullitt, supra*:

"As in *Cramp* v. *Board of Public Instruction*, '[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms, affirmatively protected by the Constitution.' 368 U. S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to 'steer far wider of the unlawful zone' Speiser v. Randall, 357 U. S. 513, 526 than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.

* * * * *

"Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment of those with a conscientious and scrupulous regard for such undertakings.

* * * * *

"The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscien-

> tiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'the free dissemination of ideas may be the loser.'"

The purported justification for this infringement upon freedom of speech and association is stated in the preamble to the Feinberg Law (Section 3022, New York Education Law) as follows:

> "The legislature finds that members of such [subversive] groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine *without regard to truth* or free inquiry" (emphasis added). (Laws of New York 1949, Chapter 360, Section 1.)

Given this finding, it is hardly reasonable to expect the Certificate to operate as an effective self-disclosure device in the elimination of subversives. In any event, there can be no reasonable justification for the breadth and uncertainties of the Certificate and the complex of statutes, rules and procedures in which it is set. The most likely result of the statutory and administrative scheme in question will not be to screen out active Communists, but rather to force the withdrawal from teaching of persons who for reasons of conscience will not submit to governmental inquiry into political belief and association, and to sweeping and ill-defined restrictions upon their freedom of expression as part of their contract of employment.

To conclude, we submit that the present jumble of statutes and administrative regulations severely impair First

Amendment rights without any substantial enhancement of a legitimate state interest and without any evidence that there are not less restrictive means available to accomplish the basic state purpose. The statutes and administrative rules and procedures are, therefore, unconstitutional.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,
Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,
Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES, BOARD OF REGENTS, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE, CIVIL SERVICE COMMISSION, MARY GOODE KRONE AND ALEXANDER A. FALK

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IN THE

Supreme Court of the United States

October Term, 1966
No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,
Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,
Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES, BOARD OF REGENTS, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE, CIVIL SERVICE COMMISSION, MARY GOODE KRONE AND ALEXANDER A. FALK

Preliminary Statement

This brief is submitted on behalf of appellees Board of Regents, Arthur Levitt, Department of Civil Service of the State of New York, the Civil Service Commission, Mary Goode Krone, and Alexander A. Falk, for affirmance of the judgment of a three-judge United States District Court which dismissed the complaint.

State University of New York and the remaining appellees are represented by the State University Counsel who is submitting a separate brief.

The Action

This action, which was brought by five persons employed by the State University of New York at Buffalo challenges the constitutionality of Section 105 of the Civil Service Law of the State of New York, Sections 3021 and 3022 of the Education Law of the State of New York and the Rules of the Board of Regents adopted pursuant thereto.

The complaint asked that the case be referred to a three-judge District Court to hear and determine and that an order be granted restraining the enforcement of said statutes and rules pending the determination of that Court. It also asked that those appellants who had been dismissed or suspended from the State University for non-compliance with the statute and rules be reinstated (Record, pp. 14-15)*.

Hon. JOHN O. HENDERSON, District Judge, denied appellants' motion and dismissed the complaint upon the ground that "in large part the issues raised by the complaint had been laid to rest by the decision of the Supreme Court of the United States in *Adler* v. *Board of Education*, 342 U. S. 485 (1952)" (233 F. Supp. 752 [1964]).

The United States Court of Appeals, Second Circuit, on May 3, 1965, reversed and remanded, with instructions to the District Court to convene a three-judge District Court (345 F. 2d 236 [1965]).

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* All references are to pages in the Record unless otherwise indicated.

A three-judge District Court for the Western District of New York (Hon. LEONARD P. MOORE, United States Circuit Judge, Hon. HAROLD P. BURKE, United States Chief District Judge and Hon. JOHN O. HENDERSON, District Judge) was convened. On January 5, 1966, that Court, by a unanimous decision, found constitutional the statutes, rules and procedures attacked by appellants in this action. The opinion of the Court (written by Circuit Judge MOORE) is reported in 255 F. Supp. 981 and is printed in the Record at pages 278-299.

Statutes Involved

The statutes involved are quoted in full in the appendix to this brief. Set forth below is a brief summary of their provisions and historical development.

a. Statutes and rules at the time of the *Adler* case.

Education Law § 3022. This section was first added to the Education Law in 1949 and is commonly known as the Feinberg Law (L. 1949, c. 360). Its purpose was to eliminate from the State's public school system as teachers, persons who advocate the overthrow of the government by force, violence or any unlawful means. This was to be done by implementing the pre-existing provisions of Civil Service Law § 12-a and Education Law § 3021.

As originally enacted, the first subdivision of Section 3022 directed the Board of Regents to adopt rules and regulations for the disqualification or removal from employment in the public school system of the State of any persons violating the provisions of Civil Service Law § 12-a and Education Law § 3021.

The second subdivision of Section 3022 directed the Board of Regents, after inquiry, notice and hearing, to list organ-

izations which advocate the overthrow of the government by force, violence or other unlawful means, and to provide by rules that membership in any such organization is *prima facie* evidence of disqualification for employment in the school system.

Education Law § 3021. At the time of the enactment of the Feinberg Law, Section 3021 directed the removal of persons employed in the public schools of any city or school district of the State for any treasonable or seditious words or acts.

Civil Service Law § 12-a. At the time of the enactment of the Feinberg Law, Section 12-a of the Civil Service Law disqualified for employment in the civil service of the State or in any school, college or State educational institution any person who advocated the overthrow of the government by force, violence or any unlawful means.

Rules of the Board of Regents. On July 15, 1949, Article XVIII, Section 244 of the Rules of the Board of Regents, entitled "Subversive Activities" was adopted by that Board pursuant to the provisions of the Feinberg Law. These Rules provided procedures to be followed for the disqualification and removal of teachers in the public schools who had violated the provisions of Education Law § 3021 or Civil Service Law § 12-a.

b. The *Adler* case.

Following the enactment of the Feinberg Law, three actions were brought almost simultaneously attacking its constitutionality. All three were the subject of separate opinions in the courts of first instance and in the Appel-Div. 463; *L'Hommedieu et al.* v. *Board of Education,* 276 Div. 463; *L'Hommedieu et al. v. Board of Education,* 276 App. Div. 497; *Lederman* v. *Board of Education,* 276 App.

Div. 527). The cases were argued together and decided as one by the New York Court of Appeals which sustained the constitutionality of the statute (301 N. Y. 476). The Court of Appeals decision was affirmed by this Court in *Lederman* v. *Board of Education*, aff'd sub nom. *Adler* v. *Board of Education*, 342 U. S. 485.

c. Statutory changes subsequent to the *Adler* case.

Education Law § 3022. In 1953, this Section, known as the Feinberg Law, was amended to include within its coverage employees of any college or institution of higher education owned and operated by the State (L. 1953, ch. 681). Although such persons had, since 1939, been disqualified by Civil Service Law Section 12-a for advocating the overthrow of the Government by force, they had not previously been covered by the Feinberg Law. This 1953 Amendment subjected them to the procedures provided for by that law and the implementing Regents Rules.

On September 24, 1953, pursuant to the provisions of Section 3022, the Board of Regents, after extensive hearings, listed the Communist Party of the United States and the Communist Party of the State of New York as subversive organizations.

Civil Service Law § 12-a. In 1958, the Legislature took cognizance of the listing by the Regents of the Communist Party of the United States and the Communist Party of the State of New York by amending Civil Service Law § 12-a to make membership in such organizations *prima facie* evidence of disqualification for any office or position in the service of the State (L. 1958, c. 503).

During that same legislative session, the whole Civil Service Law was revised and recodified (L. 1958, c. 790).

In that recodification, former Section 12-a was transferred without change to Section 105 and became subdivisions 1 and 2 of that new section.

At the same time, former Section 23-a of the Civil Service Law, which related to removal from office for treasonable or seditious acts or utterances, was amended and transferred to subdivision 3 of the new Section 105. Section 23-a is not here involved. It is referred to herein only because it eventually became subdivision 3 of Section 105 and subdivisions 1 and 2 of that section are pertinent to our inquiry.

Thus, Civil Service Law § 105 is presently composed of former Section 12-a which is contained virtually verbatim in subdivisions 1 and 2 and former Section 23-a which is contained in an amended form in subdivision 3. (See Table of Distribution in the Note to chapter 790 of the Laws of 1958). Education Law § 3022 continues to refer only to the original Section 12-a and makes no reference to the recodified Section 105.

Facts

The State University of New York is vested with the responsibility for the operation of all State-owned and operated institutions of higher education in the State of New York (Education Law, Art. 8). Following the enactment of the 1953 amendment to Education Law § 3022, which subjected these institutions to the procedures of that law and the Regents' Rules relating thereto, the State University Board of Trustees established procedures for compliance therewith.

For example, it distributed to all members of its academic staff a copy of the Regents' Rules and the underlying statutes (22). It also adopted a form of certificate (known

as the Feinberg certificate) which every applicant for a position on the academic staff of the University was required to sign before appointment (23). That form stated that the applicant had read the Regents' Rules on Subversive Activities; that he understood that the rules and laws cited therein constituted a part of the terms of his employment; and that he was not now a member of the Communist Party and that if he had ever been he had communicated that fact to the President of the State University (30).

Non-academic personnel seeking an appointment with the University were required to complete a standard civil service form on which one of the questions read as follows (211):

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

Prior to 1962, the University of Buffalo was a private educational institution. On September 1, 1962, the University of Buffalo was merged into the State University of New York and since that time has been a State-owned and operated institution of higher education known as the State University of New York at Buffalo (19). As such it became subject to the provisions of Education Law § 3022.

Following the merger, all members of the academic staff of the former University of Buffalo were required to sign a Feinberg certificate. Four of the five appellants—Keyishan, Hochfield, Garver and Maud—were holding term appointments to the academic staff at the time of the merger. When they declined to sign the certificates, they

were notified that upon the expiration of their terms, their appointments would not be renewed upon the ground of insubordination.

The fifth appellant, Starbuck, was a member of the non-academic staff of the University whose temporary appointment was terminated by dismissal when he refused to answer the question on the civil service form quoted above.

Following the commencement of this action, the Board of Trustees of State University revised its procedure for appointments to its academic staff by a resolution adopted May 13, 1965 (276-277). Under the present procedure, the Feinberg certificate is no longer required. The new procedure is as follows (276-277):

> "§ 3. Procedure for appointments.
>
> Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the courts of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question

relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment."

ARGUMENT

POINT I

This Court upheld the constitutionality of the Feinberg Law and related statutes in *Adler* v. *Board of Education*, 342 U. S. 485.

No decision of this Court since *Adler* suggests that the Feinberg Law is other than a reasonable exercise of the power of the State of New York to safeguard the public service from disloyalty.

The constitutionality of the Feinberg Law and related statutes and rules has already been upheld by the Supreme Court of the United States in *Adler* v. *Board of Education*, 342 U. S. 485. Every argument of unconstitutionality which appellants make here was made and rejected by the Court in that case.

Basically, appellants argue that the Feinberg Law and the Rules promulgated thereunder have no valid constitutional objective; that even if the legislative objective is of legitimate State concern, the means selected for accomplishing it unreasonably infringes upon appellants' rights to freedom of speech and assembly and deprives them of due process of law; and that the statute is too broad and vague. Finally, they contend that the law is void as a bill of attainder.

A review of the briefs in the *Adler* case reveals that every challenge which appellants now make to the constitutionality of the Feinberg Law was also made in that case. Appellants argue nothing new.

a. The adoption of measures to safeguard the public service from disloyalty is a valid and constitutional State concern.

The Supreme Court in the *Adler* case, considering the constitutionality of Education Law § 3022, Civil Service Law § 12-a and Regents Rule 244, pointed out that a State has a legitimate interest and concern in preventing the use of its educational system as a platform for urging students to overthrow the government by violent means. In so holding, the Court stated (p. 493):

> "* * * A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

In reaching its decision, the Court pointed out its adherence to its earlier decision in *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716 (1951), in which the Court upheld an ordinance of the City of Los Angeles requiring an oath of every person in the City service that he does not "advise, advocate or teach" the overthrow of the government by force, violence or other unlawful means and is not and has not been within the preceding five years a member of any organization which does. There the Court stated (p. 720):

> "We think that a municipal employer is not disabled because it is an agency of the State from in-

> quiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

Appellants, searching for something on which to argue that the *Adler* decision is not controlling, contend that Education Law § 3022, as amended in 1953, now covers academic personnel in universities, and contend that the law might have been proper to protect children from subversive teachers in the public schools, but not college age students. The answer is that Civil Service Law § 12-a (now § 105, subds. 1 and 2), in which this Court found "no constitutional infirmity", applied to college teachers in State educational institutions when it was upheld in the *Adler* case. At that time, § 12-a specifically applied to

> "any person * * * in the public service * * * as * * * teachers * * * in a state normal school or college, or any other state educational institution."

The reference in the *Adler* case to children in the public schools was because that case involved a challenge to the procedures in the Feinberg Law for implementing Civil Service Law § 12-a as it related to employees in the public schools.

Since the constitutional issue is the power of the State to safeguard the public service from disloyalty, there is no difference in whether the teachers are employed in high school or in college. So long as young people are within the educational process, the impact of the teacher and the need that the teacher in a State educational institution be loyal to this country is the same regardless of the level of the educational institution in which the teacher functions.

Significantly, the arguments on behalf of the plaintiffs in the *Adler* case were directed to the restrictions which the statute placed on teachers as teachers, without distinction as to the educational level of those whom they taught.

Moreover, this Court has consistently upheld the right and power of government to protect itself from disloyalty and has adhered to and applied the principles of *Adler* and *Garner* in recent cases:

Beilan v. *Board of Education*, 357 U. S. 399 (1958), quoting the *Adler* decision with approval, upheld the dismissal of a public school teacher who refused to answer questions relating to his Communist affiliations and activities;

Lerner v. *Casey*, 357 U. S. 468 (1958), upheld the discharge of a New York City subway conductor for refusing to answer a question (asked him pursuant to the New York Security Risk Law) as to whether he was a member of the Communist Party;

Nelson v. *County of Los Angeles*, 362 U. S. 1 (1960), also citing the *Adler* decision, upheld the discharge of an employee of a California county for refusing to answer a question of a committee of the United States Congress concerning subversion, as directed by an order of the county board of supervisors pursuant to a provision of the California Government Code;

Konigsberg v. *State Bar of California*, 366 U. S. 36 (1961), upheld the refusal of admission to the State Bar of California of an applicant who had refused to answer questions put to him by the California Committee of Bar Examiners relating to membership in the Communist Party;

In re Anastaplo, 366 U. S. 82 (1961), upheld the refusal of admission to the State Bar of Illinois of an applicant who had refused to answer questions put to him by the Illinois Committee on Character and Fitness, relating to membership in the Communist Party or in allegedly related organizations.

Barenblatt v. *United States,* 360 U. S. 109 (1959), upheld the contempt conviction of a former teaching fellow at the University of Michigan for refusal to answer questions of a congressional committee as to his Communist Party affiliation, on the ground that Congress has a legitimate interest in "inquiring into the extent to which the Communist party has succeeded in infiltrating into our universities * * * persons and groups committed to furthering the objective of overthrow" (p. 129).

Even in *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961), where this Court struck down a Florida statute as being too vague, it did not "question the power of a State to safeguard the public service from disloyalty" (p. 288).

b. The statutes enacted to safeguard the public colleges from disloyalty do not constitute an abridgement of freedom of speech and do not deprive appellants of due process of the law.

Before turning to a consideration of appellants' arguments on this point, it is important to analyze exactly what statutes and rules we are considering and what changes have occurred, if any, since the *Adler* decision.

At the outset it should be remembered that we are dealing only with the *hiring* of personnel at the State University of New York at Buffalo. Our concern is with the steps which the University has taken to comply with the Feinberg Law which prohibits it from employing any person who is

ineligible for appointment "on any of the grounds set forth in section twelve-a of the civil service law." (Education Law § 3022.)

As we have seen, the University, pursuant to that statutory mandate, requires all persons applying for positions on its non-academic staff to complete a civil service form on which he is asked to answer a question whether he has ever advised or taught or been a member of a group which taught or advocated the doctrine that the government of the government of the United States or of any political subdivision should be overthrown by force, violence or any unlawful means.

A person seeking an academic appointment with the University was formerly required to sign a certificate stating that he is not now a member of the Communist Party and that if he ever has been a member, he has communicated that fact to the President of State University. This procedure was recently changed so that now candidates for appointment to academic positions may be questioned concerning any possible ground for disqualification under the Feinberg Law and "refusal of a candidate to answer any question relevant to such inquiry by such officer [the hiring official] shall be sufficient ground to refuse to make or recommend appointment" (277). The candidates for such appointment are no longer required to sign a certificate.

None of the appellants ever qualified for permanent appointment to State University because those seeking academic appointments refused to sign the Feinberg certificates (then required) and the non-academic candidate Starbuck refused to answer the question on his civil service form referred to above.

Thus we are dealing only with the Feinberg Law, the statutes which it specifically implements, the Regents'

Rules and the procedures adopted by the State University to assure itself of compliance therewith in connection with the hiring of its personnel. The separate brief of State University will discuss the procedures established by the University. This brief is devoted to the issue of the constitutionality of the particular statutes under attack.

Specifically, those statutes are Education Law § 3022, which now applies to colleges operated by the State, and Civil Service Law § 105, subds. 1 and 2 (former § 12-a). No other statutes are involved in the action taken by State University.

Appellants seeks to obfuscate the real issue in this case —*viz.*, the constitutionality of the Feinberg Law as it relates to State University—by dragging in every law that has ever been enacted in the State of New York relating to subversive activity, labeling them a "statutory complex" and then seeking to avoid the decision of the *Adler* case upon the basis of speculation and facts which do not exist in this case. It should be noted that the laws which appellants now claim to comprise this "statutory complex" are not new. They were on the books in substantially the same form when *Adler* was decided. They were as irrelevant to that inquiry as they are now. Those statutes are as follows:

Education Law § 3021. This section relates to "removal of superintendents, teachers and employees for treasonable or seditious acts or utterances." We are not presently concerned with the removal of anyone for treasonable or seditious acts or words. Furthermore, by its specific terms, it applies only to a person employed as a "superintendent of schools, teacher or employee in the public schools, in any city or school

district of the state * * *." It does not apply to State University or to the facts of the present case.

Civil Service Law § 105, subd. 3. This subdivision relates to the removal of persons in the civil service for treasonable or seditious acts or words. It is derived from Civil Service Law § 23-a which was part of the law of New York State at the time of the *Adler* decision. Education Law § 3022 (the Feinberg Law), however, never referred to § 23-a and does not now. Moreover, it does not refer to § 105. It continues to refer, as it did at the time of *Adler* only to "section twelve-a". Thus, we are not now concerned with Civil Service Law § 105, subd. 3 (former § 23-a) which, as pointed out, deals with the removal of public employees for treasonable or seditious acts or words, any more than we were at the time of the *Adler* decision. We are dealing only with the failure of college-level personnel to qualify for appointment under the Feinberg Law and the procedures established thereunder for the implementation of Civil Service Law § 12-a (now § 105, subds. 1 and 2).

*Penal Law §§ 160 and 161.** These sections, referred to in Civil Service Law § 105, subd. 3, deal with

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* Civil Service Law § 105, subd. 3, refers to the Penal Law for its definitions of sedition and treason. Chapter 1030 of the Laws of 1965, effective September 1, 1967, repealed Penal Law §§ 160 and 161 and substituted the following section:

"§ 240.15 *Criminal anarchy.*

A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow. Criminal anarchy is a class E felony."

This same chapter 1030 repealed Penal Law § 2380 which defines treason.

the crime of criminal anarchy and prosecution therefor. No one here has been charged with criminal anarchy and these sections have nothing to do with our inquiry. This Court—refusing, as it does, to adjudicate speculative and abstract issues—should abstain from passing on the constitutionality of these sections until an actual controversy involving the application of Civil Service Law § 105, subd. 3, and based upon an interpretation thereof by the State's courts, is presented for determination. Particularly in view of the amendment to these sections which becomes effective on September 1, 1967 (L. 1965, ch. 1030).

We come then to the crux of our inquiry, *viz.*, a challenge to Education Law § 3022 as it implements Civil Service Law § 105, subds. 1 and 2. No other statutes are involved. A careful study of these sections reveals that we are here concerned with substantially the same provisions of law as were upheld in *Adler* except they are now being applied to the college-level personnel. The only other change is the addition of the final sentence to section 105, subd. 1 (c), which appellants claim is a bill of attainder and will be discussed in full in Point II of this brief.

Turning then to the *Adler* case, we find that this Court characterized that action as one for declaratory judgment that Civil Service Law § 12-a (now § 105, subds. 1 and 2), as implemented by the Feinberg Law, be declared unconstitutional (342 U. S. 485, at p. 491)—exactly the same problem with which we are now faced.

In the *Adler* case, this Court rejected the argument, which is also made here, that the Feinberg Law and the Rules promulgated thereunder "constitute an abridgement of freedom of speech and assembly of persons employed or seeking employment", stating (pp. 492, 493):

"It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds,* 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell,* 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose. * * *

"If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."

Equally without merit is appellants' assertion that the provisions of § 3022 of the Education Law and § 105(1)(c) of the Civil Service Law, which make membership in the Communist Party *prima facie* evidence of disqualification for state employment, are contrary to procedural due process. The same argument was before this Court in *Adler* and was decisively rejected (pp. 494-496):

"Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard.

'The statute also makes it clear that * * * proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process.' 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, 814-815.

> "Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

In accordance with its well established principle, this Court in *Adler* accepted the construction by the highest court of New York as to the procedural due process provided by the Feinberg Law (*Cf. Seagram, et al.* v. *Hostetter,* 384 U. S. 35 [1966]; *NAACP* v. *Button,* 371 U. S. 415 [1963]). That construction, of course, stands as the three-judge Court below stated.

The recent decision of this Court in *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), is not to the contrary. In that case this Court struck down an oath and accompanying statutory gloss which automatically subjected to immediate dismissal and criminal penalties any state employee who knowingly became a member of an organization which had as one of its purposes the violent overthrow of the government. The Court held that a "law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."

Such is not the case here. The whole thrust of the Feinberg Law, as construed by the New York courts and this Court, is premised upon knowing advocacy with the final burden of proof thereof resting with the employer.

Fourteen years have passed since the Feinberg Law was upheld by this Court—fourteen years of practical application by those who administer it. In those fourteen years there has been no instance of due process having been denied under it, no instance of its application or use to curb innocent activity, belief or speech, as appellants contend it will do.

This is the simple demonstration that the Feinberg Law is what this Court and the Court of Appeals of New York in *Adler* said it is and does, not what appellants here theorize it might do.

c. Education Law § 3022 and Civil Service Law § 105, subds. 1 and 2 are not invalid for vagueness.

There is no merit to appellants' contention that the language of the challenged sections is so vague that it tends to deter legitimate expression of ideas and requires a teacher to act at his peril because proscribed acts are not clearly defined.

Section 105(1) of the Civil Service Law clearly lists three causes for ineligibility for employment in the state civil service, *viz.* wilfully advocating, advising or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine. Similarly, subdivision 2 of § 3022 of the Education Law is directed at persons or organizations which "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown * * * by force."

Analyzing the language of these statutes, Judge MOORE, writing for the three-judge Court which decided this case below, stated (pp. 292-293):

> "Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should 'be overthrown * * * by force' is a basis for adverse consequences under these sections. Not innocent membership in the Communist Party; in contrast to what could

have been deterred by the oath struck down in *Wieman* v. *Updegraff*, 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952); only knowing membership in an organization advocating the violent overthrow of government is grounds for ineligibility for state employment. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), aff'd *sub nom. Thompson* v. *Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), aff'd *sub nom. Adler* v. *Board of Education*, 342 U. S. 485, 72 S. Ct. 380 (1952); see also *Adler* v. *Wilson*, 282 App. Div. 418, 123 N. Y. S. 2d 655 (3rd Dept., 1953).

"Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the 'duty, necessity, or propriety' of adopting the doctrine of violent overthrow, before he can be disqualified from state employment."

Directing itself to the same argument—that the statute was vague and indefinite—the Supreme Court in the *Adler* case said (p. 496):

"It is also suggested that the use of the word 'subversive' is vague and indefinite. But the word is first used in § 1 of the Feinberg Law, which is the preamble to the Act, and not in a definitive part thereof. When used in subdivision 2 of § 3022, the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence."

The cases of *Baggett* v. *Bullitt*, 377 U. S. 360 (1964) and *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), relied upon by the appellants here, affirmed rather than repudiated the principles of the *Adler* decision. Although both of these cases involved oaths which this Court found to be too vague, it is significant that in both opinions, this Court contrasted such oaths with the clearly stated grounds for disqualification for employment under the Feinberg Law.

In the *Cramp* case this Court said (p. 286):

> "The provision of the oath here in question, it is to be noted, *says nothing of advocacy of violent overthrow of state or federal government.* It *says nothing of membership or affiliation with the Communist Party, past or present.* The provision is completely lacking in these or any other terms susceptible of *objective measure.* * * *" (Italics ours.)

In *Baggett* this Court said (p. 370) the "Washington oath *goes beyond overthrow or alteration by force or violence.*" (Italics ours.) That is one of the criteria of the Feinberg Law, which was upheld in *Adler.*

This Court, at the conclusion of the *Baggett* opinion, declared (p. 372):

> "As in *Cramp* v. *Board of Public Instruction, supra,* we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

The sole issue in the *Baggett* case was whether the language of the two oaths, one of which applied to teachers only and the other to public employees generally, was so vague that the person taking it could not know what conduct he was foreswearing. With respect to that, the Court posed the question whether the language of the oath applied to endorsement or support for Communist candidates for office; to a lawyer who has represented the Communist Party or its members; or to a journalist who has defended the constitutional rights of the Communist Party or its members (p. 368). The Court specifically pointed out that the oath was not limited to urging the overthrow of the government "by force or violence" (*supra*).

The teachers' oath was deemed vague because it exacted an oath that by "precept and example" the affiant would "promote respect for the flag and the institutions of the United States and the State of Washington". This Court listed some eight activities which could be deemed inconsistent with this promise (pp. 369-370). There is, of course, nothing of that sort in the New York statutes or Regents' Rules.

The whole thrust of the *Baggett* opinion is the "vague", the "indefinite", the "uncertain meanings" of the oaths required by the Washington statute.

Similarly, the *Cramp* case, which this Court in *Baggett* treated as precedent for its ruling, involved a Florida statute which required an oath by every state employee that he has not and will not "lend aid, support, advice, counsel or influence to the Communist Party" (368 U. S., at p. 279) —a requirement completely different from the New York statutes or Regents Rules.

In validating the statutes in the *Baggett* and *Cramp* cases, this Court cited the *Adler* case and reaffirmed the principle that a State may take proper measures to safeguard the public service from disloyal conduct and may even require an oath if that oath is clear and definite and directed to foreswearing the overthrow or alteration of the government "by force or violence". The only mention of the *Adler* case in those two opinions was for the purpose of distinguishing it from such cases and reaffirming the principles upon which it was based.

POINT II

The statutes are not a bill of attainder.*

Appellants argue that Education Law § 3022 and Civil Service Law § 105, subd. 1(c), constitute a bill of attainder in that they single out as ineligible for employment in State schools members of the Communist Party of New York and of the Communist Party of the United States.

In support of their position, appellants rely upon *United States* v. *Brown,* 381 U. S. 437 (1965), where a statute was held unconstitutional as a bill of attainder which made it a crime for a "person who is or has been a member of the Communist Party" to serve as an officer or employee of a labor union (except certain clerical or custodial positions) within five years of the termination of such membership.

The distinction between the statute in the *Brown* case and the present case is self-evident. The statutes here involved do not legislatively disqualify a person from government service for membership in the Communist Party, past or present. There is no automatic legislative determination of disqualification.

Education Law § 3022 leaves it to administrative determination, after notice and hearing, to list the organizations which come within the statutory definition. It makes membership in such organizations only *prima facie* evidence of disqualification. Membership may be severed in good faith; membership may be explained. Furthermore, it was only after extensive hearings that the Board of Regents listed two organizations under § 3022, *viz.,* the Communist Party of New York and the Communist Party of the United States, and its determination was subject to

* This argument was also made and rejected in the *Adler* case.

judicial review (*Thompson* v. *Wallin*, 301 N. Y. 476, aff'd *sub. nom. Adler* v. *Board of Education*, 342 U. S. 485).

Similarly, Civil Service Law § 105, subd. 1(c) does not automatically disqualify a teacher as the result of a "legislative trial". It creates only a *prima facie* presumption of disqualification which is subject to rebuttal. Moreover, this presumption was not based upon an original determination by the Legislature as to the aims of the Communist Party but was based upon the Regents' findings made pursuant to Section 3022 (L. 1958, ch. 503, sec. 1).

This is altogether different from the statute in the *Brown* case, and the procedure followed here was not condemned therein. The majority opinion in that case distinctly declared that it was "not holding" that "subversives must be permitted to hold sensitive government positions."

Where, as here, we have no automatic disqualification as the result of a legislative trial, the statutes do not constitute a bill of attainder (*Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1 [1961]).

CONCLUSION

The judgment appealed from should be affirmed.

October 25, 1966.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED
and
RULES OF THE BOARD OF REGENTS

Civil Service Law

§ 105.[1] *Subversive activities; disqualification.* 1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advo-

[1] Subdivisions 1 and 2 formerly § 12-a, renumbered L. 1958, ch. 790. Subdivision 3 formerly § 23-a, renumbered L. 1958, ch. 790.

cates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division of thereof.

2. A person dismissed or declared ineligible pursuant to his position with pay for the period of such suspension or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the

utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

Laws of 1958, chapter 503

Section 1. Declaration of legislative intent. The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law"; that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that

membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a[2] of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a

[2] Now section 105, subds. 1 and 2.

listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a[3] of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

[3] Now section 105, subds. 1 and 2.

Rules of the Board of Regents
(Adopted July 15, 1949)

Article XVIII

Subversive Activities

Section 244. *Disqualification or removal of superintendents, teachers and other employes.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a[4] of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of

[4] Now section 105.

each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justified such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving

under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12a[5] of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year

[5] Now section 105, subds. 1 and 2.

ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

NOV 15 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

On Direct Appeal from the Final Judgment of a Three Judge United States District Court Sitting in the Western District of New York

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BATAVIA, N. Y.

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Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

On Direct Appeal from the Final Judgment of a Three Judge United States District Court Sitting in the Western District of New York

REPLY FOR APPELLANTS

This reply is submitted on behalf of the above named appellants in support of their brief and in answer to briefs filed by State University Counsel and the Attorney General of the State of New York, attorneys for "Bd. of Trustees *et al.*" and "Bd. of Regents *et al.*", respectively.

POINT I

We are now told by the "Bd. of Regents *et al.*" that Sections 3021 of the New York Education Law and 105(3) of the Civil Service Law should not be considered by this Court as "pertinent to our inquiry". We are further informed that appellants seek to "obfuscate" the real issues in this case "by dragging in every law that has ever been enacted in the State of New York relating to subversive activity . . ." (Brief for Bd. of Regents *et al.*, p. 15). Any confusion in this case has not arisen from any misconception of the issues on the part of appellants. It should be pointed out that the argument of appellees with respect to the non-applicability of Sections 3021 and 105(3) *is made here in this Court for the first time.* In fact, the appellees have consistently defended the constitutionality of these sections through three courts of the federal system (as well as in their motions to dismiss appellants' Statement as to Jurisdiction filed with this Court). Indeed, on the basis of arguments made by the appellees, Judge Henderson, in originally dismissing appellants' application for a temporary injunction stated that Section 3021 had been clarified (*Keyishian, et al. vs. Board of Regents, et al.*, 233 F. Supp. 752 at p. 753). In the Court of Appeals for the Second Circuit, the appellees declared "Section 3022 implements Section 3021" and further, they stated:

> "Because subdivision (3) of Section 105 of the Civil Service Law is, except for the new clarifying sentence, the same as Education Law, Section 3021, it is not new to the issue in this case if Section 3021 is not new.
>
> We submit Section 3021 is not new". (Brief for Bd. of Regents *et al.* in the Second Circuit.)

It has been observed that the Court of Appeals reversed and remanded the action to be heard by a three man court.

The court's holding that a substantial federal question is presented is significant in that the holding is partly based on the fact that "*Adler* . . . refused to pass upon the constitutionality of Section 3021 . . . [and that] . . . several statutory amendments, such as Section 105(3) of the Civil Service Law are all subsequent to *Adler*" (*Keyishian, et al. vs. Board of Regents, et al.*, 345 F. 2d 236 at p. 238).

In argument to the three judge court, the appellees continued their defense of the above mentioned sections without raising a hint that they did not believe them to be "pertinent". Thereafter, that Court found "constitutional Section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law . . ." (*Keyishian, et al. vs. Board of Regents, et al.*, 255 F. Supp. 981 at p. 994). Thus, three federal courts have passed upon and held Sections 3021 and 105(3) to be a part of the present complex and applicable to the present appellants. Appellants also point out that the appellees entered into a stipulation of fact in the Court below which contained the following provisions:

> "Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: . . . Subdivision (1) of Section 3022, as amended by Chapter 681, Laws, 1953, directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from the employment of the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law. For precise provisions of these statutes, reference is made to the text thereof." (Record, p. 22).

This Stipulation of Fact, along with others, was certified to this Court to be the record in this case. In passing, we note that

> "Louis J. Lefkowitz, Attorney General of the State of New York, attorney in this action for defendants . . . agrees that this stipulation constitutes the record of fact in this case which would have been made by plaintiffs and defendants . . . had a trial taken place." (Record, p. 27).

The activity of the appellees in the courts has its parallel in their activities with respect to enforcement of those provisions of law presently involved in the case at bar. An examination of these activities indicates that for years the appellees have enforced *all* of the statutes indicated and required university employees to conform their conduct in a manner consistent with the prohibitions contained therein.[1] The appellees for several years distributed a booklet to all members of the university's academic staff which booklet contained the Regents Rules and the underlying statutes (Record, pp. 233-255) along with a certificate requiring consent that the laws contained in the booklet constituted the terms of their employment. It should be observed that in the laws distributed, wherever the words "Section 12-a" appear, one can find an asterisk and at the bottom of the page, "now Section 105" (Record, pp. 237, 238, 241, 244 and 247). It should also be noted that the booklet which was distributed to these appellants bears the date 1959 (Record, p. 233), one year after the recodification of Section 105.[2]

It is plain from what has been stated above, that it is not the appellants who would obfuscate the issues in this

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[1] Resulting in a continual "application" of the complex.

[2] Interestingly enough, the asterisk method was consistently utilized by the defendants in all of their printed briefs in the three courts of the federal system in which this case has been argued. The same method was followed in the brief filed by these defendants in this Court in opposition to appellants' Statement as to Jurisdiction; see Motion to Dismiss Appeal by Attorney General of the State of New York, pp. 97-99; (but see Brief for Bd. of Regents *et al.*, pp. 31, 32 and 35. Evidently, appellees overlooked p. 33 of their brief, since the change is not made on that page).

case. We might also make here a general observation concerning the argument of appellees. It seems that the argument is based upon the philosophy that tactics should play a central role under the adversary system. Like the attorney who has no hesitation in "springing" a surprise witness in a lawsuit, the appellees have suddenly reversed a position long held and have done so on the eve of the oral argument of this Court. Their attempt by this technique to rid themselves of the problems presented by the above mentioned statutes is forlorn. It is impossible, by even the most adroit conclusory characterization to eliminate from this lawsuit the objective, indeed, categorical disqualification from public employment which these statutes embody.

A. With respect to the New York Education Law, Section 3021.

The contention which appellees make with respect to this section need not detain us long. It is claimed that the section, by its specific terms, applies only to a person employed as a "superintendent of schools, teacher or employee in the public schools, in any city or school district of the state . . .". From this language the appellees reach the facile conclusion that the section "does not apply to State University or to the facts of the present case". (Brief for Bd. of Regents, *et al.*, p. 16). The appellees do concede, however, that Education Law, Section 3022, is a part of this lawsuit. Upon reading this last named section, we discover that it directs the Board of Regents to

> ". . . adopt, promulgate, and enforce rules and regulations for the disqualification or removal of . . . faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the State . . . who violate the provisions of Section Three Thousand Twenty-one of this Article . . .". New York Education Law, § 3022.

The reference to Section Three Thousand Twenty-one could hardly be more specific.

B. With respect to New York Civil Service Law, Section 105(3).

The contention of appellees with respect to this section is similarly transparent. This contention has its genesis in the proposition that former Civil Service Law Section 12-a is presently embodied in Subdivisions (1) and (2) of Civil Service Law, Section 105. At this point, the appellees note that Education Law, Section 3022 refers only to "the original Section 12-a and makes no reference to the recodified Section 105." (Brief for Bd. of Regents, *et al.*, p. 6). On the basis of this fact, the appellees conclude that only Subdivisions (1) and (2) of Section 105 can be considered by this Court. The argument has no merit. The appellees fail to point out that this litigation was sparked originally by the distribution throughout the State University system of the "Regents Rules on Subversive Activities" and the requirement that University Professors certify in writing that the Regents Rules "*as well as the laws cited therein* are a part of the terms of my employment" (emphasis supplied). Among the laws "cited therein" is Civil Service Law, Section 105(3) (See Exhibit "7" to Stipulation of Fact, Record, p. 233 at p. 250).

Appellees have consistently maintained that Section 105, as well as former 12-a, applies by its terms to a ". . . teacher in a public school or academy or in a state college or in any other state educational institution . . ." (see brief for Bd. of Regents, *et al.*, p. 11).[8] Thus there can be no doubt as to its present application to these appellants.

[8] Appellants maintain that Section 12-a was not attacked as unconstitutional in the original *Adler* case and was not considered in its application to university personnel.

Additionally the shallowness of the appellees' contention is strikingly illustrated by the fact that the requirement that Section 105 shall be a part of the appellants' contract terms remains in full force even under the new procedures adopted by the State University.

> "§ 3. PROCEDURE FOR APPOINTMENTS.
>
> Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University . . . the officer authorized to make such appointment . . . shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents." (Record, p. 276).
>
> "FURTHER RESOLVED, that any person presently employed by the University shall not be deemed ineligible or disqualified for continuance in his employment . . . provided he is found qualified for such continuance . . . in accordance with the procedures proscribed in said new Section 3 . . ." (Record, p. 277).

Appellees make further claim that even if Sections 3021 and 105(3) are a part of this lawsuit, that this Court should abstain from ruling upon them. The appellants have previously set forth their views with respect to whether or not this case is one for abstention (Appellants' main brief, p. 108). We wish only to add here that the additional grounds stated by appellees for abstention (the amendment to the Penal Law, Sections 160 and 161, effective on September 1, 1967) should have no bearing on this lawsuit. At present, the only laws in force are Penal Law, Sections 160 and 161. It is with respect to these laws that the appellants have been and are required to regulate their conduct. It is with respect to these laws that the appellants have been injured and it is these laws which are presently being administered.

We cannot know whether or not the new law will be amended or indeed whether it will become effective in any form on September 1, 1967. There will be yet, before that date, another session of the New York State Legislature and we cannot speculate now as to the final form in which the law will become effective.[4] The further argument of appellees that "we are not presently concerned with the removal of anyone for treasonable or seditious acts or words" (Brief for Bd. of Regents, *et al.*, p. 15) avoids the issue. Appellants must consent to regulate their conduct within the standards embodied in the statute and furthermore the obligation to do so is a continuing one.[5]

The complex is thus "applied" to these appellants in a much more insidious manner than if action were being taken under it. The requirement that university professors conform their conduct to standards which prohibit innocent activities and speech presents a constitutional issue of the highest rank. Especially is this so where the standards imposed are incapable of being ascertained.[6]

POINT II

Appellees make claim that "the constitutional issue is the power of the State to safeguard the public service from disloyalty, . . ." (Brief for Bd. of Regents, *et al.*, p. 11) and suggest, as did the Court below, that it would be dan-

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[4] As the amended law now stands, the Penal Law definition of treason has been omitted, thus leaving the Penal Law definition reference in Section 105(3) of the New York State Civil Service Law undefined with respect to treason.

[5] The claim that "we are dealing only with the hiring of personnel at the State University" (Brief for Bd. of Regents *et al.*, p. 13) is contrary to fact. See N. Y. Education Law Section 3022 (". . . Who are ineligible for appointment to *or retention* . . ." [emphasis supplied]); see also N. Y. Civil Service Law Section 105 (". . . nor shall any person employed . . . Be continued in such employment . . ."); see also "Regents Rules" Section 244(4) (". . . or retention . . ."). Thus the obligation to conform continues after employment.

[6] Thus the case at bar involves not only questions of inquiry but also the constitutionality of statutory standards as the context in which the inquiries are made.

gerously anomalous to proscribe the advocacy of violent overthrow of government in all parts of the United States except in the "breeding grounds" of the future leaders of our nation (Brief for Bd. of Trustees, *et al.*, p. 10).

In fact the constitutional issue in the case at bar is not the power but the extent and limits of the power as well as the constitutionality of the means utilized by the State herein. To attack a strawman by posing the case as being one which turns upon grounds indicated by the appellees is to formulate an issue which does not exist. Appellants have never suggested that the status of a university professor should insulate him in the commission of *acts* which are prescribed to the ordinary individual. Indeed, one of the constitutional issues raised is the fact that the freedoms of speech and association of the university professor are by reason of this complex more restricted than those of the private individual. Thus, appellants have advanced a definition of academic freedom which involves the right to speak, act and believe in the same manner as an ordinary individual without fear of loss of employment (Brief for appellants, pp. 84-85). Additionally, appellants have shown that a university professor is disqualified from public employment on the basis of innocent conduct and speech (Brief, p. 32), and merely for holding certain forbidden beliefs (Brief, p. 39), and on the basis of a law which was passed without a legislative showing that an impelling subordinating need existed (Brief, pp. 61-62) to protect the State from the infiltration of its universities by "subversives". Also, appellants have taken what can only be considered to be a reasonable approach to this very difficult constitutional question. Appellants have advanced the proposition that the interest of the State and of society requires at the very least that the speech and conduct of university professors be judged with

the same restrictive standards as this Court would apply in cases involving criminal prosecution (Brief, pp. 42-45). Thus, we have indicated that the complex is unconstitutional by its failure to distinguish between advocacy of doctrine and advocacy which incites to violence and for the reason that it denies employment for "knowing" rather than "active" membership in proscribed groups. In support of their view that knowing membership is enough to disqualify appellants from employment, the appellees rely on the statement in *Adler* that:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing that the organization stands for, namely, the overthrow of the government by unlawful means." (*Adler v. Board of Education*, 342 U. S. 485 at pp. 494-495; Brief for Board of Regents, *et al.*, at p. 19).

There are significant differences between *Adler* and the case at bar. However, appellants do not rest on these distinctions as it seems that this Court has overruled *Adler* on the above point in subsequent decisions.[7] See *e.g. Scales*

[7] It is plain that *Adler's* holding with respect to knowing membership owes more to *Dennis v. United States*, 341 U. S. 494, than it does to *Garner v. Los Angeles*, 341 U. S. 716 (the contentions of the appellees notwithstanding). The dominant theme which was to underly convictions under the "membership" clause of the Smith Act was set out in the concurring opinion of Justice Jackson in Dennis, *supra*, at p. 577, where he stated:

> "When our constitutional provisions were written, the chief forces recognized as antagonists in the struggle between authority and liberty where the government on the one hand and the individual citizen on the other. It was thought that if the State could be kept in its place the individual could take care of himself.
>
> In more recent times these problems have been complicated by the intervention between the State and the citizen of permanently organized, well-financed, semi-secret and highly disciplined political organizations. Totalitarian groups here and abroad perfected the technique of creating private parliamentary organizations to coerce both the public government and its citizens. These organizations assert as against our government all of the constitutional rights and immunities of individuals and at the same time exercised over their followers much of the authority which

(Footnote continued on following page)

v. United States, 367 U. S. 503; *Noto v. United States*, 367 U. S. 291, *Aptheker v. Secretary of State*, 378 U. S. 500 and *Elfbrandt v. Russell*, 384 U. S. 11. These cases present an irrefutable conclusion of law that the State of New York, as employer, has no legal right to disqualify from public employment membership in proscribed groups which is merely "knowing" and which is unaccompanied by the member's active attempts to further the unlawful ends of the organization. Unlike the *Adler* case, these decisions recognize the critical fact that one may be a member of the group without being a member of the conspiracy. *Adler* is contrary and is in conflict with these more recent decisions. *Adler* embodies a legislative assumption that one who is a member of the group is a member of the con-

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(Footnote continued from preceding page)

they denied to the government. The Communist Party realistically is a state within a state, and authoritarian dictatorship without a republic. It demands these freedoms, not for its members, but for the organized party. It denies to its own members at the same time the freedom to dissent, to debate, to deviate from the party line, and enforces its authoritarian rule by crude purges, if nothing more violent.

The law of conspiracy has been the chief means at the government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the government. There is no constitutional right to 'gang up' on the government."

Subsequent to *Adler* the "conspiracy approach" was elaborated upon by the Court of Appeals for the Fourth Circuit in *Scales v. United States*, 227 F. 2d 581. *Scales* involved a prosecution under the Smith Act on an indictment charging membership in the Communist Party. The Court declared at p. 587:

"The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purposes; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forceful overthrow of the government."*

* This Court granted certiorari, *Scales v. United States*, 350 U. S. 992 and later reversed, *Scales v. United States*, 355 U. S. 1, on the basis of a memorandum filed with the court by the solicitor admitting that the convictions had to be reversed in light of this Court's holding in *Jencks v. United States*, 353 U. S. at 657. The conspiracy approach has been considerably weakened by this Court's insistence in *Scales v. U. S.*, 367 U. S. 203 and *Noto v. U. S.*, 367 U. S. 291 that "active" membership involves more than the mere "act" of membership.

spiracy and requires the affected individual to come forward and prove the innocence of his conduct, thus conflicting with this Court's determination in *Speiser v. Randall*, 357 U. S. 513.

The standards enunciated by the Court in the decisions referred to above should be extended to cover university personnel, as the interests of the State in safeguarding the integrity of its universities and professors is of paramount importance, see *e.g. Sweezy v. New Hampshire*, 354 U. S. 234.

Of course the constitutional defect of punishment for mere "knowing" membership is further aggravated in the New York system by reason of the fact that the complex assumes a conspiracy—"membership in the Communist Party of the United States of America or of the Communist Party of the State of New York shall constitute *prima facie* evidence of disqualification . . ." (New York Civil Service Law, Section 105(1)(c)), and does not require the State in any dismissal proceeding to prove that the Communist Party presently advocates violent overthrow.[8] In view of these factors, it is submitted that *Adler* does not meet the issues raised by this case.

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[8] In 1958 the Committee on Public Employee Security Procedures for the State of New York made the following recommendation with respect to the then Civil Service Law, Section 12-a:

> "There is one respect, however, in which the Committee believes that an amendment to Section 12-a can make it more workable without jeopardizing the legitimate interests of the individual. In order to discharge a member of the Communist Party from public employ, subdivision (c) of that section would require the discharging officer to prove not only that the employee is a member of the Communist Party but also that the party teaches or advocates that the government of the United States, the state, or its political subdivisions should be overthrown by force or violence or unlawful means. However, after notice and lengthy hearings, extending over more than six months, the Board of Regents of the State of New York has found that the Communist Party of the United States of America and the Communist Party of the State of New York were "subversive"' within the meaning of Section 3022 of the Education Law (known as the Feinberg Law) in that they advocate, advise, teach or embrace the doctrine that the government of the United States should be overthrown by force and violence.[1]

(Footnote continued on following page)

POINT III

Appellees dismiss appellants' argument that the complex is a bill of attainder with the statement that "where, as here, we have no automatic disqualification as the result of a legislative trial, the statutes do not constitute a bill of attainder . . ." (See Brief for Bd. of Regents, *et al.*, p. 26). Embodied within that statement is a concept which can have profound repercussions not only on these appellants but upon all citizens of this nation as well. The appellees declare and the Court below held that a statute may assume guilt without offending the constitutional prohibition against bills of attainder. The acceptance of this view by this Court would effectively destroy a protection which has its origin in a long experience with tyranny. The doctrine of assumption of guilt is alien to most civilized nations. If this Court holds that a Legislature may assume guilt, two small words, "*prima facie*", will have provided the lever with which to destroy an historical prohibition.

(Footnote continued from preceding page)

It seems to the Committee that there is no valid end to be served to require in each proceeding under Section 12-a of the Civil Service Law that in order to prove a *prima facie* case the discharging officer must establish that the Communist Party of the United States of America and the Communist Party of the State of New York teach or advocate the overthrow of the government by force or violence. This fact has been so carefully and repeatedly established that to put the initial burden of proving it in each single case on the discharging officer encumbers the government uselessly and without corresponding gain in protection of the individual.

We therefore suggest that Section 12-a be amended to provide that, since the Communist Party of the United States of America and the Communist Party of the State of New York have been found by the Board of Regents, after notice and hearing, to be subversive within the meaning of subdivision (c) of Section 12-a, membership in either of those organizations shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the service of the state or of any civil division or city thereof." Recommendations of Committee on Public Employee Security Procedures, New York State Legislative Annual—1958 (P. 70-71).

This recommendation was accepted by the Legislature. See New York Civil Service Law, Section 105(1)(c). See also declaration of intent which prefaced amendment (Record P. 299)."

Appellants believe that this aspect of the case presents this Court with an issue of fundamental and far reaching importance. We urge this Court to reject the doctrine of assumption of guilt and place our reliance upon the oldest (*Cummings v. Missouri*, 71 U. S. 277) and the most recent (*United States v. Brown*, 381 U. S. 437) decisions of this Court in this area. Of course, both *Cummings* and *Brown* can be distinguished. But the rationale of these cases does not turn on factual distinctions. These cases embody the principle that a legislature may neither declare nor assume guilt consistent with the constitutional prohibition against bills of attainder. Indeed, a legislative assumption of guilt seems to be "the very name of tyranny".

CONCLUSION

For the reasons stated above and in appellants' original brief, the complex should be declared unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966

No. 105

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Statement

This brief is submitted on behalf of the above named appellees. These appellees who were made defendants, with others, in the suit are those directly connected with the State University of New York, a higher educational institu-

tion maintained and operated by the State, and will be separately referred to herein as the "University defendants."

The appellee, Samuel B. Gould, became President of State University of New York on September 1, 1964 (Record p. 69) and was added as an additional party defendant after the suit was instituted (Record p. 18).

The formerly private University of Buffalo merged into the State University of New York as of September 1, 1962 (Record p. 19). The merger was accomplished pursuant to New York Education Law Section 355, subdivision 2, paragraph e. The effect was to make the University of Buffalo thereafter an integral part of the State University of New York, known as the State University of New York at Buffalo, owned and operated by the State. Its faculty and staff became employees of the State of New York subject to state law governing such employees generally and particularly to New York Education Law Section 3022 (the so-called Feinberg Law) which, as amended by Chapter 681 of New York Laws of 1953, had been expressly made applicable to the faculty and staff of institutions of higher education owned and operated by the State or any subdivision thereof.

The academic employees of the State University of New York are in the unclassified service of the civil service of the state (Civil Service Law Section 35, paragraphs (h) and (j)). Thus they are not subject to classification nor to certification by the state Civil Service Commission. The determination of their qualifications and appointment are solely the responsibility of the University itself. In 1953 the Board of Regents had, after notice and hearing, listed the Communist Party of the State of New York and the

Communist Party of the United States of America as subversive in that they advocated the overthrow of government by force, violence or other unlawful means as set forth in Section 105 (formerly Section 12-a) of the Civil Service Law. This raised the presumption provided for in the Regents Rules pursuant to the Feinberg Law that a knowing member of such organizations was ineligible for appointment in the public schools. The Feinberg Law and the presumption so provided for had been held valid by this Court in *Adler* v. *Board of Education,* 342 U. S. 485. Conscious, both of their duties as public officers to comply with the laws of the state and their responsibilities as the governing board of a university, the trustees sought to devise a uniform, university-wide method of making the necessary inquiry which would eliminate uncertainties as to its objective and avoid unwarranted intrusions on personal freedoms (Record pp. 224, 225). This was the procedure for new academic appointments (Record pp. 218-225, 233-260). The prescribed certificate asked only that a prospective appointee recognize that the laws and regulations of the state by which he was to be employed formed part of the terms of his employment and his own statement as to an organizational membership relevant to his eligibility as to which information was made necessary by such laws and regulations.

The certification asked was as to a specific fact about which there could be no misunderstanding. Its particularity was such that no one need guess whether he might honestly so certify. Moreover the information sought by the certificate was not exclusionary. The revelation of party membership could have led only to further inquiry as to whether an applicant or employee was ineligible as a committed advocate of the unlawful overthrow of government.

It is noted here that the New York Court of Appeals in *Thompson* v. *Wallin*, 301 N. Y. 476 (aff'd *sub nom. Adler* v. *Board of Education*, 342 U. S. 485) had already held that the party membership must be with knowledge of the organization's unlawful objective and that the phrase "*prima facie* evidence of disqualification" imported a hearing at which one seeking appointment or retention could present evidence to overcome the presumption. If this were done, the presumption disappears and any finding of ineligibility would have to be sustained by the officer making it in a hearing upon judicial review mandated by subdivision 2 of Section 105 of the Civil Service Law.

When the University of Buffalo was merged into State University it was recognized by the University defendants that they must comply with the law relating to eligibility for employment or retention of the staff and it was sought to do so by use of the established University procedures for that purpose. But there was neither precipitate haste nor were there threats of drastic action. There was patient and extended effort to answer the objections of those who raised them, to explain the statutory requirements and the limitation of the disqualification to those who deliberately advocated that the government "should" be overthrown by unlawful means (See correspondence with various faculty members, Record pp. 263-275 and letter of President Gould to President Furnas, Record pp. 69-73). In particular it was sought to give assurance that the University did not construe the statutory test to be political belief, as distinguished from active advocacy of the unlawful overthrow of government, or to inhibit free intellectual inquiry in the realm of political ideas (Record p. 267).

The appellant Keyishian had a term appointment expiring in August, 1964. He had no tenure beyond the expira-

tion of his term and had been given appropriate notice that his appointment would not be renewed. He was not found ineligible for reappointment but was not reappointed because of his refusal to furnish information relevant to his eligibility.

The appellants Hochfield, Garver and Maud each had term appointments which had not expired at the time President Gould assumed office and when he instructed President Furnas on November 4, 1964, that they should not be prejudiced as to continuance or normal advancements and salary increases pending a disposition of this suit (Record p. 72). This was on the ground that there had been no misrepresentation on their part and they were not presently alleged to advocate violent overthrow of government. Though no stay is in effect, they had raised in good faith the validity of the requirement with which they were asked to comply. The appellant Maud resigned his employment by State University as of September 1965. It would seem that he no longer has standing to appear as a party to the suit.

The appellant Starbuck was not employed in an academic position in the unclassified service and was not asked to sign the certificate prescribed by the University's procedure. His position was in the classified service under temporary certification from the appellee Department of Civil Service. He refused to answer the question on payroll form PR-75 relating to advocacy of the doctrine of unlawful overthrow of government (Record p. 212), and his discontinuance was directed by the Civil Service Commission because of the expiration of the temporary certificate authorizing his employment (Record p. 25).

On May 13, 1965, the University trustees rescinded their former procedures and adopted a resolution setting up a new method for making the determination of eligibility for

appointment to the professional service required by the Feinberg Law. The former requirement for the execution of a certificate by the applicant has been eliminated. The prospective appointee is given a statement prepared by the President of the University explaining the disqualification imposed by Civil Service Section 105 and Education Law Section 3022. The officer making the appointment or the initial recommendation therefor must then make such inquiry as may be needed to satisfy himself as to whether or not such candidate is disqualified under those statutes, as well as to his other qualifications for the position. A personal interview may be required, and refusal to answer any question relevant to the inquiry is sufficient ground to refuse to make the appointment or recommendation.

A further resolution adopted on the same day makes the new procedure applicable to those who have failed to furnish the certificate previously required. It provides that they shall not be deemed disqualified or ineligible, nor subject to charges of misconduct, solely by reason of such failure, if found qualified under the new procedure (Record pp. 276, 277). Manifestly the new procedure does not and could not make the statutes and Regents Rules inapplicable. Pending the disposition of this case no final action has been taken with respect to any of the appellants under the new procedure now in effect, and made applicable to them, for carrying out the duties of the University defendants.

Questions Presented

The brief of the Attorney General takes up the issues sought to be raised by appellants as to the validity of the New York statutes designed to preclude from public employment those who would overthrow the government of the United States or of the State and its political subdivi-

sions by force and violence. The University defendants for whom this brief is submitted rely upon the Attorney General's presentation for the basic validity of the State statutes with which they, in pursuance of their own sworn duty, were bound to comply.

Under Section 3022 of the New York Education Law the Board of Regents have, after notice and hearing, listed the Communist Party of the United States and the Communist Party of the State of New York as subversive organizations, creating a presumption that knowing membership therein disqualified for public employment in the State's public educational institutions. The basis for the disqualification and the presumption, as well, had been contested and sustained by this Court in *Adler* v. *Board of Education*, 342 U. S. 485. These appellees, concerned as a University for academic freedom, sought no foreswearing of beliefs, no promise of future conduct or representation as to past conduct in terms susceptible of misunderstanding, or indeed in any terms. They sought, by the certificate under their former procedure, to elicit only an understanding that academic employees were, like the University itself, bound by State laws and the categorical facts as to an organizational membership which was a presumptive disqualification for employment. Under the new procedure only information relevant to the statutory disqualification may be sought in addition to information relating to personal and professional qualifications for a particular academic position. As to the University defendants, the question is whether it has been shown that they have imposed any requirement or seek any information which is not relevant to a valid condition of eligibility for State employment.

A further question arises because of appellants' demand for monetary relief. Here it is the University defendants'

position that they are not sued for some personal tortious act or personal breach of contract. The gravamen of the allegations against them is that they sought in good faith to carry out the provisions of State laws claimed to be invalid. If there is any liability for monetary damages it is that of the State of New York over which the Federal courts have no jurisdiction in this action. Any such claim can be determined initially only in the Court of Claims of the State of New York.

Summary of Argument

The University defendants have not construed or applied the statutes and rules in issue so as to inhibit personal beliefs or associations not knowingly directed to the overthrow of government by violence or other unlawful means.

They have not applied such statutes and rules to impede the teaching of political and social history and ideas nor to obstruct the expression of any such ideas to be accomplished by peaceful and lawful means.

They have construed the statutory "complex" as requiring a knowing support of the objective that the existing government "should" be overthrown by violence or other than peaceful and lawful means and as creating a rebuttable presumption that Communist Party members are so committed subject to full due process for reviewing any adverse determination.

The State has a proper interest in preventing its public educational facilities, including colleges and universities, from being used to advance such illegal objectives.

The actions of the University defendants complained of were properly limited to obtaining information which they

were required to ascertain and entitled to have in the performance of duties imposed on them by law.

ARGUMENT

The procedures prescribed by the University defendants were and are designed only to enable compliance on their part with State law. The inquiries made are specific and directly relevant to the determination of a valid condition of eligibility for employment by such defendants in the public institutions in their charge subject to procedures fully protecting the rights of those seeking employment.

The State University of New York, while owned and operated by the State and subject to State laws, is an institution of higher learning. The duties of its governing board include the responsibility of administering it so as to further full and free intellectual inquiry which is both the function and the distinguishing mark of any true university (*Sweezey* v. *New Hampshire,* 354 U. S. 234). In that tradition the trustees have been quick to resist attempts to restrict the freedom of the University's students to invite and hear speakers of all shades of political thought, including members of the Communist Party as well as those of the far right. In *Matter of Egan* v. *Moore,* 20 A. D. 2d 150, aff'd 14 N. Y. 2d 775, the trustees supported in the courts their determination that there was no provision of State law forbidding the students to hear an avowed Communist for dispassionate intellectual examination of his doctrine against an attempt to enjoin his appearance. They were successful in sustaining their position that any such external dictation as to the subjects which might be academically considered would be an intolerable limitation on a university.

But personal freedom of belief and academic freedom to teach and to learn do not include freedom to cloak a purpose to bring about the violent overthrow of the very government which supports the university and secures it its freedom, nor to use the opportunities afforded by the university to advance that objective among its students. The basic ineligibility for public employment under the New York statutes is of those who would tear down the government with which they seek employment by other than the peaceful and lawful means open to them under its Constitution and laws. The Feinberg Law expresses special legislative concern about the enforcement of that provision in public educational institutions. *Barenblatt* v. *United States,* 360 U. S. 109, well illustrates the overriding interest of the State, not in controlling what is taught in universities, but in protecting itself against unlawful overthrow. The amendment of the Feinberg Law makes it clear that the Legislature of New York found the interest of the State to be at least equally at stake with respect to public colleges and universities as in the lower levels of the educational system. As held by the court below it would be a dangerous anomoly if the advocacy of violent overthrow (as opposed to the teaching of Communist philosophy) could not be proscribed "in the breeding grounds of the future leaders of the nation" (Record p. 283).

Legislative enactments, even those restricting particular kinds of utterances, are endowed with a presumption that they are necessary and desirable in the dominant public interest derived from the prior legislative determination (*American Communications Assoc.* v. *Douds,* 339 U. S. 382, 401). Here the University defendants dealt not only with a statute presumably valid but one sustained by this Court in *Adler* v. *Board of Education,* 342 U. S. 485. They were

not free to pluck parts from the context of the statutory scheme, as do appellants. It is the particular context which is "all important" (*American Communications Assoc.* v. *Douds,* 339 U. S. 382, 412) and determines whether a statute proceeds on a proper basis and gives fair notice of its requirements. The dominant theme of the New York statute is that public employment is not open to those who knowingly and wilfully advocate that government should be overthrown by other than lawful means. A knowing purpose to advance that objective runs through the statutory "complex" and enters into each of its provisions. The presumption raised by party membership under the Feinberg Law provisions is only that a knowing member supports such illegal objective. It was for this reason that information as to party membership was essential to the determination of eligibility for faculty employment which was the responsibility of the University defendants under laws by which they were bound.

The single actual fact requested by the certificate formerly required avers that the signer is not now a member of the Communist Party and, that if he has been a member he has notified the President of the State University of New York. This statement of fact is neither an oath nor a disclaimer of any vaguely specified conduct or belief. Appellants (other than Starbuck) have refused to sign the certificate and the question before the Court, as it affects such appellants, is the right of the State University of New York to question present and prospective personnel to determine whether they fall within a class made presumptively ineligible for appointment by law.

The essential question is whether the University may ask these specific questions as an initial inquiry to obtain information to determine whether further explanation is neces-

sary to insure that an employee is not ineligible by reason of the valid specific grounds enumerated in Section 105 of the Civil Service Law or *prima facie* disqualified by reason of the valid presumption flowing from Communist Party membership.

This Court has upheld the right of the State and its civil divisions to inquire of employees on matters of loyalty that may prove relevant to their fitness and suitability for the public service (*Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716, *Adler* v. *Board of Education*, 342 U. S. 485).

The Court, in factual situations analogous to this case, has repeatedly expressed the principle that a public employer has a right to pose relevant questions to an employee regarding his associations and activities to elicit information on his past or present advocacy of the overthrow of the government by force, violence or other unlawful means or his organization of, or membership in, any group which advocates the violent overthrow of government. This principle applies not only to applicants for potential employment but to all employees regardless of their length of service. The cases base disqualification or dismissal on the ground that a public employee or applicant for public employment has an obligation to his present or potential employer to provide a minimal standard of candor and frankness in answering questions concerning knowing associations or activities, whether past or present, which reflect on his fitness and suitability for public employment. Of course, the individual has the right and privilege to remain silent but cannot thereby obtain or retain employment in the publice service. These cases base disqualification or removal solely on the failure to answer a relevant question which thus impedes a proper inquiry process and are not based

upon the invocation of the privilege against self-incrimination or inferences from the failure to answer specific questions as evidence or proof of any specific fact (*Beilan* v. *Board of Public Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *Re Anastalpo*, 366 U. S. 82).

Further in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, this Court, while declaring a particular Florida Oath as constitutionally defective, stated:

> "Nor do we question the power of a State to safeguard the public service from disloyalty. *Cf. Slowocher* v. *Board of Higher Education*, 350 U. S. 551, 100 L. ed. 692, 76 S. Ct. 637; *Adler* v. *Board of Education*, 342 U. S. 485, 96 L. ed. 517, 72 S. Ct. 380, 27 ALR 2 D. 472" (P. 287).

In *Baggett* v. *Bullitt*, 377 U. S. 360, 12 L. ed. 2nd 377 (1964) which referred to *Cramp*, this Court said:

> "As in *Cramp* v. *Board of Public Instruction, supra*, we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct" (P. 390).

Thus, the *Cramp* and *Baggett* cases have reaffirmed the principle that the government has a right to make inquiry of employees and prospective employees in the public service to ascertain that they do not advocate the doctrine of the overthrow of the government by force and violence nor are they knowing members of organizations which so advocate such doctrine.

The certificate heretofore required by the State University asked only for a statement of a categorical fact relevant to determination of a valid qualification for employment fixed by law. That fact was whether a person is or

has been a member of the Communist Party. There can be no doubt as to what was asked. No one need guess at his peril whether he may honestly so certify one way or the other. No one risked foreswearing his individual right of free expression of his views or peaceful action to bring about change. Indeed the revelation of present Party membership would be only presumptive evidence of disqualification and if found ineligible the statute itself provides for a full judicial hearing, in addition to any University hearing to which an employee's tenure might entitle him (New York Civil Service Law Section 105[2]). The communication of past Party membership to the President enables a determination by him on further inquiry as to whether it has been terminated in good faith, subject to the same right of hearing, if found ineligible. But refusal to furnish specific information sought by the University in order to comply with the laws by which it is governed can only be deemed to be insubordinate defiance of its requirements.

It may be added that the further provision of the certificate, that an applicant or employee state that the law and rules are a part of the terms of his employment, can be no more vague or uncertain as to what is being acknowledged than the law or rules themselves. If they are valid, as has been held, they would enter into the terms of employment in any event. It cannot be a proper ground of complaint that they are specifically brought to an employee's attention. Nor can there be any invalid vagueness in asking recognition of the objective requirements of the New York law. Every man can know with certainty whether he advocates the doctrine that the government should be forcefully overthrown or whether he is a member of the Communist Party, which creates a valid presumption of such advocacy. If he does advocate such doctrine no view of constitutional

right yet expressed says that he may not be disqualified for public employment. Since such a measure of eligibility is constitutionally permissable, there can be no violation of rights because a public employer seeks relevant information and no right to employment in the face of wilful refusal to furnish it.

It is possible the appellants feel that the State University of New York has no right to ask any questions concerning their political-social affiliations or activities. Carried to its logical context in this pertinent background there would then be no incompatibility with fitness and loyalty for a Communist Party member presumptively committed to violent overthrow of government to teach in a public institution in this state. To pose the question and answer in the affirmative would be a paradox. If his party membership is innocent, the Civil Service Law itself preserves a full right of *de novo* judicial hearing on that issue. But to refuse the information, given the validity of the statute, is to demand the right of appointment while at the same time asserting a right to withhold relevant information about a pertinent qualification.

The allegation of vagueness because of the complexity of statutes, regulations and rules is denied by defendants. Actually the publication of the University of the State of New York mentioned on the face of the Trustees' Certificate, entitled "Regents Rules on Subversive Activities", correlates in a booklet the various provisions of statutes, regulations and rules. The writing is organized, clear and unaffected. The rules and regulations trace their statutory authority and outline the due process procedural requirements in an adequate fashion. There is no more complexity in this pamphlet than the subject matter warrants.

Given the right to make the inquiry, it cannot be said that the form in which the University has previously done so by certificate is burdensome, unnecessary, or unreasonable. It relied upon direct inquiry to the one best positioned with the facts. It hoped for an honest reply that may not in fact be given. But surely the propensity of those who would destroy the government by force to misrepresent does not cast the right to inquire in constitutional doubt. Nor can direct inquiry of an applicant be any less admissible than inquiry from other sources as to a fact which bears on his qualifications. Indeed direct inquiry is the usual way of establishing employment qualifications.

Appellants' attempt to expand the University's certificate into an interference with their academic freedom and right of political expression is a perverse refusal to recognize the limited and categorical nature of the inquiry made and its clear relation to the kind of loyalty which the State may constitutionally require of those who seek to enter its service.

By their refusal appellants obstructed the University's efforts to determine in good faith whether they met qualifications fixed by statutes binding on the University. Should their answers, if given, have revealed past, but not present, Party membership, the President had opportunity under the procedure to determine whether it has been terminated in good faith. Should present membership have been established the statute itself (New York Civil Service Law Section 105(2)) provides for full judicial hearing in which the presumption of disqualification may be overcome. If appellants are not, and never have been, Party members no presumption of disqualification arises. But refusal to answer frustrates the University's duty and prevents determination of the appellants' rights as affected by their an-

swers in accordance with the due process provided by New York law. Even their refusal to answer cannot result in summary dismissal as to those presently having term or tenure appointments under the University's own policies. These could only be dismissed on charges after hearing before a University faculty committee known as the Standing Committee on Terminations.

In fine, if Communist Party membership may be made a relevant consideration upon qualification for employment under the New York statutes, which have been held valid and as to which we refer the Court to the brief of the Attorney General herewith, then these defendants submit that there can be no merit to any objection here posed to the manner in which they have previously sought to inquire into and determine that qualification, subject to all the safeguards of the New York law.

It concedes no question of the validity of the former procedure that the University has now changed it to eliminate the signing of a certificate which aroused the opposition of the academic world. That opposition has been directed both at the policy and legality of so called "loyalty" inquiries. It often proceeds by imputing to disqualifications imposed by law or regulation a far broader reach and purpose than a fair reading will sustain. Upon such fallacious premises the argument of interference with academic freedom and constitutionally protected rights is built.

In this case it is sought to stretch a test of fitness for public employment directed against deliberate teaching that government "should" be destroyed by violence or other unlawful means into an interference with teaching about history or social, economic and political issues against which it was never aimed. The new procedure of the University no longer requires a certificate by an appointee.

It still requires inquiry to be made by appointing officers for the University cannot alter the eligibility requirements fixed by the Legislature.

The new procedure provides for a statement explaining the law and presumptive disqualification of Communist Party membership so that prospective appointees will be fully informed of the conditions under which they may properly accept appointment. It provides opportunity for the applicant to request an interview at which any matter relevant to his qualifications may be fully and fairly discussed with the appointing officer, including any matter in rebuttal of a presumptive disqualification. It provides also that the appointing officer may require an interview at which he may resolve any doubts he may have by direct inquiry and where the applicant can have the opportunity to be heard upon any relevant matter. There must still be an ultimate determination that the applicant does not deliberately advocate that the government "should" be overthrown by violent or unlawful means. Should he be held ineligible on any such ground we stress again that the Civil Service Law itself entitles him to a *de novo* judicial hearing with the burden on the University. But no man may be held ineligible for advocating changes in laws or governmental policies, however unpopular, by the means lawfully open in our free society so long as it remains free. The University seeks only to determine, as it must, in which category fall those who seek to serve it in its educational mission.

CONCLUSION

The judgment of the Court below should be, in all respects, affirmed.

October 27, 1966.

Respectfully submitted,

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Attorney for Board of Trustees of
State University of New York,
State University of New York at Buffalo,
Samuel B. Gould, Clifford C. Furnas, and
J. Lawrence Murray, Appellees

DAVID L. SEGEL
Associate Counsel

SUPREME COURT OF THE UNITED STATES

No. 105.—October Term, 1966.

Harry Keyishian et al., Appellants, *v.* The Board of Regents of the University of the State of New York et al.	On Appeal From the United States District Court for the Western District of New York.

[January 23, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

Appellants were members of the faculty of the privately owned and operated University of Buffalo, and became state employees when the University was merged in 1962 into the State University of New York, an institution of higher education owned and operated by the State of New York. As faculty members of the State University their continued employment was conditioned upon their compliance with a New York plan, formulated partly in statutes and partly in administrative regulations,[1] which the State utilizes to prevent the appointment or retention of "subversive" persons in state employment.

Appellants Hochfeld and Maud were Assistant Professors of English, appellant Keyishian an instructor in English, and appellant Garver, a lecturer in philosophy. Each of them refused to sign, as regulations then in effect required, a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State Uni-

[1] The text of the pertinent statutes and administrative regulations in effect at the time of trial appear in the Appendix to the opinion.

versity of New York. Each was notified that his failure to sign the certificate would require his dismissal. Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate. Hochfeld and Garver, whose contracts still had time to run, continue to teach, but subject to proceedings for their dismissal if the constitutionality of the New York plan is sustained. Maud has voluntarily resigned and therefore no longer has standing in this suit.

Appellant Starbuck was a nonfaculty library employee and part-time lecturer in English. Personnel in that classification were not required to sign a certificate but to answer in writing under oath the question, "Have you ever advised or taught or were you ever a member of any society or group of people which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?" Starbuck refused to answer the question and as a result was dismissed.

Appellants brought this action for declaratory and injunctive relief alleging that the state program violated the Federal Constitution in various respects. A three-judge federal court held that the program was constitutional. 255 F. Supp. 981.[2] We noted probable jurisdiction of appellant's appeal, 384 U. S. 998. We reverse.

I.

We considered some aspects of the constitutionality of the New York plan 15 years ago in *Adler* v. *Board of Education*, 342 U. S. 485. That litigation arose after New York passed the Feinberg Law which added § 3022

[2] The District Court initially refused to convene a three-judge court, 233 F. Supp. 752, and was reversed by the Court of Appeals for the Second Circuit. 345 F. 2d 238.

to the Education Law.[3] The Feinberg Law was enacted to implement and enforce two earlier statutes. The first was a 1917 law, now § 3021 of the Education Law, under which "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act" is a ground for dismissal from the public school system. The second was a 1939 law which was § 12–a of the Civil Service Law when *Adler* was decided and, as amended, is now § 105 of that law. This law disqualifiies from the Civil Service and from employment in the educational system any person who advocates the overthrow of government by force, violence, or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society or group of persons advocating such doctrine.

The Feinberg Law charged the State Board of Regents with the duty of promulgating rules and regulations providing procedures for the disqualification or removal of persons in the public school system who violate the 1917 law or who are ineligible for appointment to or retention in the public school system under the 1939 law. The Board of Regents was further directed to make a list, after notice and hearing, of "subversive" organizations, defined as organizations which advocate the doctrine of overthrow of government by force, violence, or any unlawful means. Finally, the Board was directed to provide in its rules and regulations that membership in any listed organization should constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the State.

The Board of Regents thereupon promulgated rules and regulations containing procedures to be followed by

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[3] For the history of New York loyalty-security legislation, including the Feinberg Law, see Chamberlain, Loyalty and Legislative Action, and that author's article in Gellhorn, The States and Subversion, 231.

appointing authorities to discover persons ineligible for appointment or retention under the 1939 law, or because of violation of the 1917 law. The Board also announced its intention to list "subversive" organizations after requisite notice and hearing, and provided that membership in a listed organization after the date of its listing should be regarded as constituting prima facie evidence of disqualification, and that membership prior to listing should be presumptive evidence that membership has continued, in the absence of a showing that such membership was terminated in good faith. Under the regulations, an appointing official is forbidden from making an appointment until after he has first inquired of an applicant's former employers and other persons to ascertain whether the applicant is disqualified or ineligible for appointment. In addition, an annual inquiry must be made to determine whether an appointed employee has ceased to be qualified for retention, and a report of findings must be filed.

Adler was a declaratory judgment suit in which the Court held, in effect, that there was no constitutional infirmity in former § 12–a or in the Feinberg Law on their faces and that they were capable of constitutional application. But the contention urged in this case that both § 3021 and § 105 are unconstitutionally vague was not heard or decided. Section 3021 of the Education Law was challenged in *Adler* as unconstitutionally vague, but because the challenge had not been made in the pleadings or in the proceedings in the lower courts, this Court refused to consider it. 342 U. S., at 496. Nor was any challenge on grounds of vagueness made in *Adler* as to subsections (1)(a) and (b) of § 105 of the Civil Service Law.[4] Subsection (3) of § 105 was not

[4] The sole "vagueness" contention in *Adler* concerned the word "subversive," appearing in the preamble to and caption of § 3022. 342 U. S., at 496.

added until 1958. Appellants in this case timely asserted below the unconstitutionality of all these sections on grounds of vagueness and that question is now properly before us for decision. Moreover, to the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. *Adler* is therefore not dispositive of the constitutional issues we must decide in this case.

II.

A 1953 amendment extended the application of the Feinberg Law to personnel of any college or other institution of higher education owned and operated by the State or its subdivisions. In the same year, the Board of Regents, after notice and hearing, listed the Communist Party of the United States and of the State of New York as "subversive organizations." In 1956 the Board required that each applicant for an appointment or the renewal of an appointment sign the so-called "Feinberg Certificate" declaring that he had read the Regents Rules and understood that the Rules and the statutes constituted terms of employment, and declaring further that he was not a member of the Communist Party, and that if he had ever been a member he had communicated that fact to the President of the State University. This was the certificate that appellants Hochfeld, Maud, Keyishian, and Garver refused to sign.

In June 1965, shortly before the trial of this case, the Feinberg Certificate was rescinded and it was announced that no person then employed would be deemed ineligible for continued employment "solely" because he refused to sign the certificate. In lieu of the certificate, it was provided that each applicant be informed before assum-

ing his duties that the statutes, §§ 3021 and 3022 of the Education Law and § 105 of the Civil Service Law, constituted part of his contract. He was particularly to be informed of the disqualification which flowed from membership in a listed "subversive" organization. The 1965 announcement further provides: "Should any question arise in the course of such inquiry such candidate may request . . . a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." A brochure is also given new applicants. It outlines and explains briefly the legal effect of the statutes and invites any applicant who may have any question about possible disqualification to request an interview. The covering announcement concludes that "a prospective appointee who does not believe himself disqualified need take no affirmative action. No disclaimer oath is required."

The change in procedure in no wise moots appellants constitutional questions raised in the context of their refusal to sign the now abandoned Feinberg Certifiicate. The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application.

III.

Section 3021 requires removal for "treasonable or seditious" utterances or acts. The 1958 amendment to § 105 of the Civil Service Law, now subsection 3 of that section, added such utterances or acts as a ground for removal under that law also.[5] The same wording is used

[5] There is no merit in the suggestion advanced by the Attorney General of New York for the first time in his brief in this Court that § 3021 of the Education Law and § 105 (3) of the Civil Service Law are not "pertinent to our inquiry." Section 3022 of the Education Law incorporates by reference the provisions of both, thereby

in both statutes—that "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" shall be ground for removal. But there is a vital difference between the two laws. Section 3021 does not define the terms "treasonable or seditious" as used in that section; in contrast, subsection 3 of § 105 of the Civil Service Law provides that the terms "treasonable word or act" shall mean "treason" as defined in the Penal Law and the terms "seditious word or act" shall mean "criminal anarchy" as defined in the Penal Law.

Our experience under the Sedition Act of 1798, 1 Stat. 596, taught us that dangers fatal to First Amendment freedoms inhere in the word "seditious." See *New York Times* v. *Sullivan*, 376 U. S. 254, 273–276. And the word "treasonable," if left undefined, is no less dangerously

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rendering them applicable to faculty members of all colleges and institutions of higher education. One of the reasons why the Court of Appeals ordered the convening of a three-judge court was that a substantial federal question was presented by the fact that "Adler . . . refused to pass upon the constitutionality of Section 3021 . . . [and that] . . . several statutory amendments, such as Section 105 (3) of the Civil Service Law are all subsequent to Adler." 345 F. 2d 236, 238. The three-judge court also properly found these provisions applicable to appellants in holding them constitutional. It is significant that appellees consistently defended the constitutionality of these sections in the courts below. Moreover, the three-judge court rendered its decision upon the basis of a "Stipulation of Fact," paragraph 20 of which recites:

"Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: Subdivision (1) of Section 3022, as amended . . . directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law."

uncertain. Thus it becomes important whether, despite the omission of a similar reference to the Penal Law in § 3021, the words as used in that section are to be read as meaning only what they mean in subsection 3 of § 105. Or are they to be read more broadly and to constitute utterances or acts "seditious" and "treasonable" which would not be so regarded for the purposes of § 105?

Even assuming that "treasonable" and "seditious" in § 3021 and § 105 (3) have the same meaning, the uncertainty is hardly removed. The definition of "treasonable" in the Penal Law presents no particular problem. The difficulty centers upon the meaning of "seditious." Subsection 3 equates the term "seditious" with "criminal anarchy" as defined in the Penal Law. Is the reference only to Penal Law § 160, defining criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means?" But that section ends with the sentence "The advocacy of such doctrine either by word of mouth or writing is a felony." Does that sentence draw into § 105, Penal Law § 161, proscribing "advocacy of criminal anarchy?" If so, the possible scope of "seditious" utterance or acts has virtually no limit. For under Penal Law § 161, one commits the felony of advocating criminal anarchy if he ". . . publicly displays any book . . . containing or advocating, advising, or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means."[6] Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case.

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[6] Penal Law §§ 160–161 are to be replaced effective September 1, 1967, by a single provision entitled "criminal advocacy."

We cannot gainsay the potential effect of this obscure wording on "those with a conscience and scrupulous regard for such undertakings." *Baggett* v. *Bullitt*, 377 U. S. 360, 374. Even were it certain that the definition referred to in § 105 was solely Penal Law § 160, the scope of § 105 still remains indefinite. The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts.

Other provisions of § 105 also have the same defect of vagueness. Subsection (1)(a) of § 105 bars employment of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. This provision is plainly susceptible to sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims.[7] See *Herndon* v. *Lowry*, 301 U. S. 242; *Yates* v. *United States*, 354 U. S. 298; *Noto* v. *United States*, 367 U. S. 290; *Scales* v. *United States*, 367 U. S. 203. And in prohibit-

[7] The New York State Legislative Committee on Public Employee Security Procedures, in describing this provision, noted:

"In disqualifying for employment those who advocate or teach the 'doctrine' of the violent overthrow of government [§ 105] is to be distinguished from the language of the Smith Act (18 U. S. C. §§ 371, 2385), which has been construed by the Supreme Court to make it criminal to incite to 'action' for the forcible overthrow of the government, but not to teach the 'abstract doctrine' of such forcible overthrow. *Yates* v. *United States*, 354 U. S. 298 (1957)." 1958 N. Y. State Legis. Annual, 70, n. 1.

ing "advising" the "doctrine" of unlawful overthrow does the statute prohibit mere "advising" of the existence of the doctrine, or advising another to support the doctrine? Since "advocacy" of the doctrine of forceful overthrow is separately prohibited, need the person "teaching" or "advising" this doctrine himself "advocate" it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?

Similar uncertainty arises as to the application of subsection (1)(b) of § 105. That subsection requires the disqualification of an employee involved with the distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow, and who himself "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein." Here again, mere advocacy of abstract doctrine is apparently included.[8] And does the prohibition of distribution of matter "containing" the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, and Russian revolutions? The additional requirement, that the person participating in distribution of the material be one who "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine" of forceful overthrow, does not alleviate the uncertainty in the scope of the section, but exacerbates it. Like the language of § 105 (1)(a), this language may reasonably be construed to cover mere expression of belief. For example, does the university librarian who recommends the reading of such materials

[8] Compare the Smith Act, 18 U. S. C. § 2385, which punishes one who "prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of" unlawful overthrow, provided he is shown to have an "intent to cause the overthrow or destruction of any such government."

thereby "'advocate . . . the propriety of adopting the doctrine contained therein?"

We do not have the benefit of a judicial gloss by the New York courts enlightening us as to the scope of this complicated plan.[9] In light of the intricate administrative machinery for its enforcement, this is not surprising. The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterance or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." *Baggett* v. *Bullitt*, *supra*, at 372. The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice . . . ." [10] That probability is enhanced by the provisions requiring an annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws. For a memorandum warns employees that under the statutes "subversive" activities may take the form of "the writing of articles, the distribution of pamphlets, the endorsement of speeches made or articles written or acts performed by others," and reminds them "that it is the primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case."

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[9] This is not a case where abstention pending state court interpretation would be appropriate, *Baggett* v. *Bullitt*, *supra*, at 375–379; *Dombrowski* v. *Pfister*, 380 U. S. 479, 489–490.

[10] *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (Frankfurter, J., concurring).

There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488, 489. The principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks. In *DeJonge* v. *Oregon*, 299 U. S. 353, 364, the Court said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Our Nation is deeply committeed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, *supra*, at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *United States* v. *Associ-*

ated Press, 52 F. Supp. 362, 372. In *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evalute, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

We emphasize once again that "precision of regulation must be the touchstone in an area so closely touching our most previous freedoms." *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 438; "For standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*, at 432–433. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one neccessarily will "steer far wider of the unlawful zone . . . ." *Speiser* v. *Randall*, 357 U. S. 513, 526. For "The threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N. A. A. C. P.* v. *Button*, supra, at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded

against by sensitive tools which clearly inform teachers what is being sanctioned. See *Stromberg* v. *California*, 283 U. S. 359, 369; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Baggett* v. *Bullitt*, *supra*.

The regulatory maze created by New York is wholly lacking in "terms susceptible of objective measurement." *Cramp* v. *Board of Public Instruction*, *supra*, at 286. It has the quality of "extraordinary ambiguity" found to be fatal to the oaths considered in *Cramp* and *Baggett* v. *Bullitt*. "[M]en of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt*, *supra*, at 367. Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.

We therefore hold that § 3021 of the Education Law and subsections (1)(a), (1)(b) and (3) of § 105 of the Civil Service Law as implemented by the machinery created pursuant to § 3022 of the Education Law are unconstitutional.

IV.

Appellants have also challenged the constitutionality of the discrete provisions of subsection (1)(c) of § 105 and subsection (2) of the Feinberg Law, which make Communist Party membership, as such, prima facie evidence of disqualification. The provision was added to subsection (1)(c) of § 105 in 1958 after the Board of Regents, following notice and hearing, listed the Communist Party of the United States and the Communist Party of the State of New York as "subversive" organizations. Subsection (2) of the Feinberg Law was, however, before the Court in *Adler* and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major prem-

ise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Teachers, the Court said in *Adler*, "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." 342 U. S., at 492. The Court also stated that a teacher denied employment because of membership in a listed organization "is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice." *Id.*, at 493.

However, the Court of Appeals for the Second Circuit correctly said in an earlier stage of this case, ". . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, 345 F. 2d 236, 239. Indeed, that theory was expressly rejected in a series of decisions following *Adler*. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Cramp* v. *Board of Public Instruction, supra*; *Baggett* v. *Bullitt, supra*; *Shelton* v. *Tucker, supra*; *Speiser* v. *Randall, supra*; see also *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Torcaso* v. *Watkins*, 367 U. S. 488. In *Sherbert* v. *Verner*, 374 U. S. 398, 404, we said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by a denial of or placing of conditions upon a benefit or privilege."

We proceed then to the question of the validity of the provisions of subsection (c) of § 105 and subsection (2)

of § 3022, barring employment to members of listed organizations. Here again constitutional doctrine has developed since *Adler*. Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.

In *Elfbrandt* v. *Russell*, 384 U. S. 11, we said, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. We found that "any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Elfbrandt* v. *Russell*, *supra*, at 16. *In Aptheker* we held that Party membership, without knowledge of the Party's unlawful purposes *and* specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad. As we said in *Schneiderman* v. *United States*, 320 U. S. 118, 136, "[U]nder our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization do not subscribe unqualifiedly to all of its platforms or asserted principles." "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." *Elfbrandt*, *supra*, at 19. Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see

Scales v. *United States*, 367 U. S. 203; *Noto* v. *United State*, 367 U. S. 290; *Yates* v. *United States*, 354 U. S. 298;[11] nor may it warrant a finding of moral unfitness justifying disbarment. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

These limitations clearly apply to a provision, like § 105 (1)(c), which blankets all state employees, regardless of the "sensitivity" of their positions. But even the Feinberg Law provision, applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies.[12] *Elfbrandt* and *Aptheker* state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.

Measured against this standard, both Civil Service Law § 105 (1)(c) and Education Law § 3022 (2) sweep overbroadly into association which may not be sanctioned. The presumption of disqualification arising from proof of mere membership may be rebutted, but only by (a) a denial of membership, (b) a denial that the organiza-

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[11] Whether or not loss of public employment constitutes "punishment," cf. *United States* v. *Lovett*, 328 U. S. 303, there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial.

[12] See Lazarsfeld and Thielens, The Academic Mind, 92–112, 192–217; Biddle, Freedom to Teach, 155 *et seq.*; Jahoda & Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of the Loyalty and Security Programs, 61 Yale L. J. 295 (1952). See generally, MacIver, Academic Freedom in Our Time; Hullfish, Educational Freedom in an Age of Anxiety; Konvitz, Expanding Liberties, 86–108; Morris, Academic Freedom and Loyalty Oaths, 28 Law and Contemp. Probs. 487 (1963).

tion advocates the overthrow of government by force, or (c) a denial that the teacher has knowledge of such advocacy. *Lederman* v. *Board of Education*, 276 App. Div. 527, 96 N. Y. S. 2d 466, aff'd 301 N. Y. 476.[18] Thus proof of nonactive membership or a showing of the absence of intent to further unlawful aims will not rebut the presumption and defeat dismissal. This is emphasized in official administrative interpretations. For example, it is said in a letter addressed to prospective appointees by the President of the State University, "You will note that . . . both the Law and regulations are very specifically directed toward the elimination and nonappointment of 'Communists' from or to our teaching ranks. . . ." The Feinberg Certificate was even more explicit: "Anyone who is a *member* of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University." This official administrative interpretation is supported by the legislative preamble to the Feinberg Law, § 1, in which the legislature concludes as a result of its findings that "it is essential that the laws prohibiting persons who are *members* of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced."

Thus § 105 (1)(c) and § 3022 (2) suffer from impermissible "overbreadth." *Elfbrandt* v. *Russell*, *supra*, at 19; *Aptheker* v. *Secretary of State*, *supra*; *N. A. A. C. P.* v. *Button*, *supra*; *Saia* v. *New York*, 334 U. S. 558;

[18] In light of our disposition, we need not consider appellant's contention that the burden placed on the employee of coming forward with substantial rebutting evidence upon proof of membership in a listed organization is constitutionally impermissible. Compare *Speiser* v. *Randall*, 357 U. S. 513.

Schneider v. *State*, 308 U. S. 147; *Lovell* v. *Griffin*, 303 U. S. 444; cf. *Hague* v. *C. I. O.*, 307 U. S. 496, 515–516; see generally *Dombrowski* v. *Pfister*, 380 U. S. 479, 486. They seek to bar employment both for association which legitimately may be sanctioned and for association which may not be sanctioned consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, "the hazard of loss or substantial impairment of those precious rights may be critical," *Dombrowski* v. *Pfister*, *supra*, at 486, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe. As we said in *Shelton* v. *Tucker*, *supra*, at 488, "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

We therefore hold that Civil Service Law § 105 (1)(c) and Education Law § 3022 (2) are invalid insofar as they sanction mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX.

Civil Service Law Provisions Involved.

Subdivision 1 of Section 105, New York Civil Service Law, is captioned, "Ineligibility of persons advocating overthrow of government by force or unlawful means," and provides:

"No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political

subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence or disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

SUBDIVISION 2 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had," and provides:

"Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

SUBDIVISION 3 of SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Removal for treasonable or seditious acts or utterances," and provides:

> "A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law."

EDUCATION LAW PROVISIONS INVOLVED.

SECTION 3021, NEW YORK EDUCATION LAW, is captioned "Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances," and provides:

> "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

SECTION 3022, NEW YORK EDUCATION LAW, is captioned, "Elimination of subversive persons from the public school system," and provides:

> "1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision

thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state."

RULES OF THE BOARD OF REGENTS.

ARTICLE XVIII, SECTION 244, RULES OF THE BOARD OF REGENTS (Adopted July 15, 1949), is captioned, "Subversive Activities", and provides:

"1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

*Now section 105.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers, or other employes in those cases in which in their judgment the

evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrince, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

*Now section 105.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by the presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

PENAL LAW SECTIONS INVOLVED.

SECTIONS 160 and 161 of the NEW YORK PENAL LAW provide:

"SECTION 160. Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"SECTION 161. Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive official of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth of writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such a doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

RESOLUTIONS OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK.

Resolved that Resolution 65–100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56–98 adopted on October 11, 1956, incorporated into the Policies of the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded*, and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to

make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on that date.

Resolved that any person presently employed or heretofore employed by the University who has failed to sign the certificate required by the Procedure on New Academic Appointments adopted on October 11, 1956, shall

not be deemed disqualified or ineligible solely by reason vided in new Section 3 of Title B of Article XI of the Policies of the Board of Trustees as adopted by resolution this day; and

Further Resolved that any person presently employed by the University shall not be deemed ineligible or disqualified for continuance in his employment during the prescribed term thereof, nor be subject to charges of misconduct, solely by reason of such failure, provided he is found qualified for such continuance by the Chief Administrative officer of the institution at which he is employed in accordance with the procedures prescribed in said new Section 3 of Title B of Article XI of the Policies of the Board of Trustees.

SUPREME COURT OF THE UNITED STATES

No. 105.—October Term, 1966.

Harry Keyishian et al., Appellants, *v.* The Board of Regents of the University of the State of New York et al.	On Appeal From the United States District Court for the Western District of New York.

[January 23, 1967.]

Mr. Justice Clark, with whom Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White join, dissenting.

The blunderbuss fashion in which the majority couches "its artillery of words" together with the morass of cases it cites as authority and the obscurity of their application to the question at hand makes it difficult to grasp the true thrust of its decision. At the outset, it is therefore necessary to focus on its basis.

This is a declaratory judgment action testing the *application* of the Feinberg Law to appellants. The certificate and statement once required by the Board and upon which appellants base their attack were, before the case was tried, abandoned by the Board and are no longer required to be made. Despite this fact the majority proceeds to its decision striking down New York's Feinberg Law and other of its statutes as applied to appellants on the basis of the old certificate and statement. It does not explain how the statute can be applied to appellants under procedures which have been for over two years a dead letter. The issues posed are, therefore, purely abstract and entirely speculative in character. The Court under such circumstances has in the past refused to pass upon constitutional questions. In addition,

the appellants have neither exhausted their administrative remedies, nor pursued the remedy of judicial review of agency action as provided earlier by subdivision (d) of § 12–a of the Civil Service Law. Finally, one of the sections stricken, § 105 (3), has been amended and under its terms will not become effective until September 1, 1967. (L. 1965, Ch. 1030.)

I.

The old certificate upon which the majority operates required all of the appellants, save Starbuck, to answer the query whether they were Communists, and if they were, whether they had communicated that fact to the President of the University. Starbuck was required to answer whether he had ever advised, taught, or been a member of a group which taught or advocated the doctrine that the Government of the United States, or any of its political subdivisions, should be overthrown by force, violence, or any unlawful means. All refused to comply. It is in this nonexistant frame of reference that the majority proceeds to act.

It is clear that the Feinberg Law, in which this Court found "no constitutional infirmity" in 1952, has been given its death blow today. Just as the majority here finds that there "can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion" there can also be no doubt that "the be-all and end-all" of New York's effort is here. And regardless of its correctness neither New York nor the several States that have followed the teaching of *Adler* for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little.

The section (§ 3021 of the Education Law) which authorizes the removal of superintendents, teachers, or employees in the public school in any city or school

district of New York for the utterance of any treasonable or seditious word or words is also struck down, even though it does not apply to appellants, as we shall discuss below.

Also declared unconstitutional are the subsections ((1)(a), (I)(b) and (1)(c) of § 105 of the Civil Service Act) which prevent the appointment and authorize the discharge of superintendents, principals, or teachers in any part of New York's public education establishment who wilfully advocate, advise, or teach the doctrine that the Government of the United States, or of any State or any political subdivision thereof should be overthrown by force, violence, or any other unlawful means ((1)(a)); or who prints, publishes, edits, issues, or sells any book, paper, document, or written or printed matter, in any form, containing such doctrine *and* "who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein" ((1)(b)); or who organizes or helps to organize or becomes a member of any society or group which teaches or advocates such doctrine ((1)(c)). This latter provision was amended in 1958, while still part of § 12 (a) of the Civil Service Law, to make membership in the Communist Party prima facie proof of disqualification. The language "advocate, advise, teach," etc., obviously springs from federal statutes, particularly the Smith Act, § 2 (A)(1), (2) and (3), which was approved by this Court in *Dennis* v. *United States*, 341 U. S. 494 (1951). State statutes of similar character and language have been approved by this Court. See *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Bielan* v. *Board of Education, School District of Philadelphia*, 357 U. S. 399 (1958).

Lastly stricken is the subsection ((3) of § 105) which authorizes the discharge of any person in the civil service

of the State or any civil division thereof who utters any treasonable or seditious word or does any treasonable or seditious act, although this subsection is not and never has been a part of the Feinberg Law and New York specifically disclaims its applicability to the appellants. In addition, how can the Court pass upon this law *as applied* when the State has never attempted to and now renounces its application to appellants?

II.

This Court has again and again, since at least 1951, approved procedures either identical or at the least similar to the ones the Court condemns today. In *Garner* v. *Board of Works of Los Angeles, supra,* we held that a public employer was not precluded, simply because it was an agency of the State, "from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service." 341 U. S., at p. 720. The oath there used practically the same language as the Starbuck statement here and the affidavit reflects the same type of inquiry as was made in the old certificate condemned here. Then in 1952, in *Adler* v. *Board of Education, supra,* this Court passed upon the identical statute condemned here. It, too, was a declaratory judgment action—as in this case. However, there the issues were not so abstractly framed. Our late Brother Minton wrote for the Court:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." At 496.

And again in 1958 the problem was before us in *Bielan* v. *Board of Education, School District of Philadelphia, supra.* There our late Brother Burton wrote for the Court:

> "By engaging in teaching in the public schools petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher." 357 U. S., at 405.

And on the same day in *Lerner* v. *Casey*, 357 U. S. 468, our Brother HARLAN again upheld the severance of a public employee for his refusal to answer questions concerning his loyalty. And in the same Term my Brother BRENNAN himself cited *Garner* with approval in *Speiser* v. *Randall*, 357 U. S. 513 (1958).

Since that time the *Adler* line of cases have been cited again and again with approval: *Shelton* v. *Tucker*, 364 U. S. 479 (1960), in which both *Adler* and *Bielan* were quoted with approval and *Garner* and *Lerner* were cited in a like manner; likewise in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), *Adler* was quoted twice with approval; and, in a related field where the employee was discharged for refusal to answer questions as to his loyalty after being ordered to do so, the Court cited with approval all of the cases which today it says have been rejected, *i. e., Garner, Adler, Bielan* and *Lerner*. *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960). Later *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961), likewise cited with approval both *Bielan* and *Garner*. And in our decision in *In re Anastaplo* (1961), 366 U. S. 82, *Garner, Bielan* and *Lerner* were all referred to. Finally, only two Terms ago my Brother WHITE relied upon *Cramp* which in turn quoted *Adler* with approval twice. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

In view of this long list of decisions covering over 15 years of this Court's history, in which no opinion of this Court even questioned the validity of the *Adler* line of cases, it is strange to me that the Court now finds that the "constitutional doctrine which has emerged since . . . has rejected [*Adler's*] major premise." With due respect, as I read them, our cases have done no such thing.

III.

The majority also finds that *Adler* did not pass upon § 3021 of the Education Law, nor subsection (1)(3) of § 105 of the Civil Service Law, nor upon the vagueness questions of subsections (1)(a), (1)(b), and (1)(c) of § 105. We will now discuss them.

1. Section 3021 is not applicable to these appellants. As Attorney General Lefkowitz of New York says on behalf of the State, the Board of Regents and the Civil Service Commission, this section by its own terms only applies to superintendents, teachers, and employees in the "public schools, in any city or school district of the state . . ." It does not apply to teachers in the State University at all.*

2. Likewise subsection (1)(3) of § 105 is also inapplicable. It was derived from § 23–a of the Civil Service Law. The latter provision was on the books at the time of the Feinberg Law as well as when *Adler* was decided. The Feinberg Law referred only to § 12–a of the Civil Service Law, not § 23–a. Section 12–a was later recodified as subsections (1)(a) and (b) of § 105 of the Civil

*The Court points to a stipulation of counsel that § 3022 incorporates § 3021 into the Feinberg Law. However, Attorney General Lefkowitz did not sign the stipulation itself, but in an addendum thereto, agreed only that it constituted the *record of fact*—not of law. His brief contends that § 3021 is not incorporated into the law. The legislature, of course, is the only body that could incorporate § 3021 into the Feinberg Law. It has not done so.

Service Law. Section 23–a (now § 105 (3)) deals only with the civil divisions of the Civil Service of the State. As the Attorney General tells us, the law before us has to do with the qualifications of college level personnel not covered by Civil Service. The Attorney General also advises that no superintendent, teacher, or employee of the educational system has ever been charged with violating § 105 (3). The Court seems to me to be building straw men.

3. The majority also says that no challenge or vagueness points were passed upon in *Adler*. A careful examination of the briefs in that case casts considerable doubt on this conclusion. In the appellant's brief, point 3, in *Adler*, the question is stated in this language: "The statutes and the regulations issued thereunder violate the due process clause of the Fourteenth Amendment because of their vagueness." Certainly the word "subversive" is attacked as vague and the Court finds that it "has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence." Significantly this is the language of subsections (1)(a) and (b) which the majority now finds vague, as covering one "who merely advocates the doctrine in the abstract . . ." citing such criminal cases as *Herndon* v. *Lavery*, 301 U. S. 242 (1937), which was on our books long before the *Adler* line of cases. Also significant is the fact that the *Adler* opinion's last sentence is "We find no constitutional infirmity in § 12–a [now (1)(a), (1)(b) and (1)(c) of § 105] of the Civil Service Law of New York or in the Feinberg Law which implemented it . . . ." At p. 496.

IV.

But even if *Adler* did not decide these questions I would be obliged to answer them in the same way. The only portion of the Feinberg Law which the majority says

was not covered there and is applicable to appellants is §§ 105 (1)(a), (1)(b) and (1)(c). These have to do with teachers who advocate, advise, or teach the doctrine of overthrow of our Government by force and violence, either orally or in writing. This was the identical conduct that was condemned in *Dennis* v. *United States, supra.* There the Court found the exact verbiage not to be unconstitutionally vague, and that finding was of course not affected by the decision of this Court in *Yates* v. *United States,* 354 U. S. 298. The majority makes much over the horribles that might arise from subsection (1)(b) of § 105 which condemns the printing, publishing, selling, etc., of matter containing such doctrine. But the majority fails to state that this action is condemned only *when and if* the teacher also personally advocates, advises, teaches, etc., the necessity or propriety of adopting such doctrine. This places this subsection on the same footing as (1)(a). And the same is true of subsection (1)(c) where a teacher organizes, helps to organize or becomes a member of an organization which teaches or advocates such doctrine, for scienter would also be a necessary ingredient under our opinion in *Garner, supra.* Moreover, membership is only prima facie evidence of disqualification and could be rebutted, leaving the burden of proof on the State. Furthermore, all of these procedures are protected by an adversary hearing with full judicial review.

In the light of these considerations the strained and unbelievable suppositions that the majority poses could hardly occur. As was said in *Dennis, supra,* "we are not convinced that because there may be borderline cases" the State should be prohibited the protections it seeks. At p. 516. Where there is doubt as to one's intent or the nature of his activities we cannot assume that the administrative boards will not give those offended full pro-

tection. Furthermore, the courts always sit to make certain that this is done.

The majority says that the Feinberg Law is bad because it has an "overbroad sweep." I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to wilfully and deliberately advocate, advise, or teach that our Government should be overthrown by force or violence or other unlawful means; or who wilfully and deliberately prints, publishes, etc., any book or paper that so advocates *and who personally* advocates such doctrine himself; or who wilfully and deliberately becomes a member of an organization that advocates such doctrine, is prima facie disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is "Yes"!

I dissent.